Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

BUSH & BURCHETT, INC. AND JOE BURCHETT,

Petitioners,

v.

FRED RUSSELL, JR. AND REBECCA RUSSELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether West Virginia's imposition of its "deliberate intent" Workers' Compensation statute, which permits tort-type damages to be imposed on employers where certain conditions are satisfied, violates the Full Faith and Credit and Due Process Clauses of the United States Constitution, when a worker who lives in, is employed in, is injured in, and receives workers' compensation benefits from his employer in Kentucky (which does not allow such double recovery) is also permitted to sue that same employer in West Virginia.

PARTIES TO THE PROCEEDING

A. **Petitioners.**

Petitioners are Bush & Burchett, Inc., a Kentucky corporation (hereinafter, "Bush & Burchett") and Joe Burchett, individually. Petitioners were defendants in the Circuit Court of Kanawha County, West Virginia and were appellees in the Supreme Court of Appeals of West Virginia. Bush & Burchett, Inc. is a privately held corporation and none of its shareholders are publicly held entities.

B. **Respondents.**

Respondents are Fred Russell, Jr. and Rebecca Russell. Respondents were plaintiffs in the Circuit Court of Kanawha, West Virginia and were appellants in the Supreme Court of Appeals of West Virginia.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
INTRODUCTORY PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE	2
STATEMENT OF THE CASE	4
A. Respondent is a Kentucky Resident Employed by a Kentucky Employer	4
B. Respondent Was Injured in Kentucky	4
C. Respondent Received and Enjoyed Kentucky Workers' Compensation Benefits	5
D. Procedural History	6
REASONS FOR GRANTING WRIT	7
A. The Application of West Virginia Law to the Respondents' Deliberate Intent Claims Against Bush & Burchett, Inc. and Joe Burchett Violates the Full Faith and Credit Clause of the United States Constitution	12
B. The Application of West Virginia Law Violates the Due Process Rights of Bush & Burchett, Inc. and Joe Burchett	16
CONCLUSION	19
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Alaska Packers Ass'n. v. Industrial Accident Comm., 294 U.S. 532 (1935) 12

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 13, 16, 17

Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987) 16

Borman v. Interlake, Inc., 623 S.W.2d 912 (Ky. App. 1981) 8

Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932) 12

Carroll v. Lanza, 349 U.S. 408 (1955) 12, 15

Clay v. Sun Insurance Office, Ltd., 377 U.S. 179 (1964) 14

Crider v. Zurich Insurance Co., 380 U.S. 39 (1965) 14, 15

Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172 (W.Va. 1996) 7

Garcia v. American Airlines, Inc., 12 F.3d 308 (1st Cir. 1993) 11

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 16

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970) 17

Industrial Commission v. McCartin, 330 U.S. 662 (1943) 9, 10

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 17

TABLE OF AUTHORITIES – Continued

Page

Kelly v. Guyon General Piping, Inc., 882 F.2d 108 (4th Cir. 1989) 11, 15

Magnolia Petroleum Co. v. Hunt, 329 U.S. 430 (1943) 8, 9, 10, 11

McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578 (8th Cir. 1981) 16, 17

Nevada v. Hall, 440 U.S. 410 (1979) 12, 13

Pacific Employers Insurance Co. v. Industrial Accident Comm., 306 U.S. 493 (1939) 13

Sherrer v. Sherrer, 334 U.S. 343 (1948) 13

Soo Line Railroad Co. v. Overton, 992 F.2d 640 (7th Cir. 1993) 17

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) ..... *passim*

Woodner v. Mathers, 210 F.2d 868 (D.C. Cir. 1954) 11

CONSTITUTIONS

U.S. Const. amend. XIV, § 1 ..... 2, 7, 14, 16

U.S. Const. art. IV, § 1 ..... 2, 13

STATUTES

K.R.S. § 342.610(4) 3, 8, 11

K.R.S. § 342.690 ..... 3, 8, 11

TABLE OF AUTHORITIES – Continued

Page

OTHER

4 A. Larson, *Workman's Compensation Law* § 88.11, at 16-133 to 16-139 (1992)..... 15

J. Nordlinger, *Welcome to Tort Hell*, The National Review, August 20, 2001..... 12

PETITION FOR WRIT OF CERTIORARI

COME NOW the Petitioners, by their counsel, and hereby respectfully request that this Honorable Court grant their Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, that it reverse and vacate the judgment of the Supreme Court of Appeals of West Virginia as expressed in its November 28, 2001 Opinion and January 23, 2002 Order, and reinstate the judgment of the Circuit Court of Kanawha County, West Virginia, which correctly applied the law of the Commonwealth of Kentucky and dismissed the Respondents' claims against the Petitioners herein, and for such other relief as this Honorable Court deems just.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia that the Petitioners ask this Court to review is *Russell v. Bush & Burchett, Inc., et al.*, 559 S.E.2d 36 (W.Va. November 28, 2001), along with an unpublished Order dated January 23, 2002 refusing to grant the Petitioners' Petition for Rehearing. Both the November 28, 2001 Opinion and the January 23, 2002 Order are reproduced in the Appendix.

JURISDICTION

The Petitioners asks this Honorable Court to review the November 28, 2001 Opinion and Judgment of the

Supreme Court of Appeals of West Virginia and its subsequent January 23, 2002 Order which, in contravention of the principles of Full Faith and Credit and Due Process under the United States Constitution, reversed the judgment of the Circuit Court of Kanawha County, West Virginia. Should this Honorable Court grant the Petition, it would have jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution, Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes § 342.610(4):

"If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons."

Kentucky Revised Statutes § 342.690 (excerpt, full text set forth in Appendix):

"If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

STATEMENT OF THE CASE

A. Respondent Is A Kentucky Resident Employed By A Kentucky Employer.

This case arises out of a November 1, 1996, accident in which respondent Fred Russell, Jr., was injured when he was struck by a crane which caused him to fall thirty (30) feet to the ground while he worked for Bush & Burchett building two (2) bridges between Pike County, Kentucky, and Mingo County, West Virginia. Respondent worked in both West Virginia and Kentucky. Appendix, p. 80.

Petitioner Bush & Burchett is a Kentucky corporation which maintains its corporate headquarters in Allen, Floyd County, Kentucky. Petitioner Joe Burchett is the president of Bush & Burchett and is also a Kentucky resident. Appendix, p. 66.

Mr. Russell also confirmed that he always resided in Kentucky during the time he worked for Bush & Burchett. Appendix, pp. 80-81. Respondent would travel each day from his home in Salyersville, Kentucky, with a co-worker in a company truck to the job site.

B. Respondent Was Injured In Kentucky.

Respondent has also confirmed that his accident occurred **in Kentucky**. Respondent testified that the area where he was working at the time of his accident was in Kentucky, the crane was located in Kentucky and the area where he was struck by the crane and fell was in Kentucky. Appendix, pp. 76, 79-80.

C. Respondent Received and Enjoyed Kentucky Workers' Compensation Benefits.

After Mr. Russell's injury, Mr. Russell received compensation payments from Bush & Burchett's Kentucky carrier, the Kentucky Associated General Contractors Self-Insurer's Fund, beginning on November 18, 1996. See: Appendix, p. 85. His medical bills were paid by the Kentucky Associated General Contractors Self Insurer's Fund. Appendix, p. 77. Each of the disability checks, sent weekly, clearly identified the source of payment and were endorsed and cashed by the respondent, Fred Russell, Jr. Appendix, p. 85.

Mr. Russell had his medical expenses paid, received temporary total disability benefits of over Twenty-One Thousand Dollars ($21,000.00) and received a lump sum settlement of One Hundred Thousand Dollars ($100,000.00) from his employer's Kentucky Workers' Compensation carrier. Mr. Russell was represented by counsel during the negotiation and settlement of his claim under the Kentucky Workers' Compensation Act. Appendix, pp. 189-194.

Although Bush & Burchett had a contract with the West Virginia Department of Transportation, Division of Highways (hereinafter, the "DOH"), the relationship between Bush & Burchett and Fred Russell was born and nurtured in Kentucky. Appendix, p. 74. Both employer and employee were Kentucky citizens. It is undisputed that the accident occurred in Kentucky and respondent received Kentucky Workers' Compensation benefits.

D. Procedural History.

Petitioners Bush & Burchett and Joe Burchett, moved for Summary Judgment in the Circuit Court of Kanawha County, West Virginia (hereinafter, the "Circuit Court"), arguing that Kentucky law is applicable to this matter and would result in the dismissal of the respondents' claims. The Circuit Court entered an Order granting the Motion for Summary Judgment of Bush & Burchett and Joe Burchett and dismissing the respondents/plaintiffs' claims against them. The Circuit Court agreed that Kentucky law was applicable to the Russells' claims and dismissed the West Virginia claims against petitioners. Appendix, pp. 23-28.

Respondents appealed the Circuit Court's decision to the Supreme Court of Appeals of West Virginia. The issues on appeal were thoroughly briefed by the parties, specifically the prevailing choice of law rule in tort cases in West Virginia, the doctrine of *lex loci delicti*. Subsequently, on November 28, 2001, the Supreme Court of Appeals of West Virginia issued its opinion in this matter. Appendix, pp. 1-22.

In a brief two and a half (2½) page opinion (Appendix, pp. 9-12), the Supreme Court of Appeals of West Virginia applied principles of comity to conclude that the respondents/plaintiffs could bring their claims against Bush & Burchett and Joe Burchett under West Virginia law.[1]

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[1] None of the parties raised or argued the principles of comity in their briefs, and the Supreme Court of Appeals of West Virginia had previously determined that principles of

Bush & Burchett and Joe Burchett then filed their Petition for Rehearing in the Supreme Court of Appeals of West Virginia, arguing that the decision of the Supreme Court of Appeals of West Virginia which reversed the judgment of the Circuit Court violated the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court of Appeals of West Virginia refused the Petition for Rehearing of Bush & Burchett and Joe Burchett by Order entered January 23, 2002. See: Appendix, pp. 29-30. It is from that Order and the November 28, 2001 Opinion of the Supreme Court of Appeals of West Virginia that Bush & Burchett and Joe Burchett hereby petition this Honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Decision of the West Virginia Court Demonstrates Why *Thomas v. Washington Gas Light Company, et al.*, 448 U.S. 261 (1980) Was Decided Incorrectly and Why the Double Recovery Permitted by the Decision of the Court Below Should Not Be Permitted to Stand.

The ruling of the Supreme Court of Appeals of West Virginia allows Mr. Russell to bring a "deliberate intent" suit pursuant to the West Virginia workers' compensation

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comity were inapplicable to statutory deliberate intent actions under West Virginia law, such as the respondents/plaintiffs' claims against petitioners/defendants Bush & Burchett, Inc. and Joe Burchett. See: *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172, 175-176 (W.Va. 1996).

statute. Appendix, pp. 35-39. The deliberate intent claim under the statute presents the potential for a tort-type recovery under the West Virginia workers' compensation statute. Despite its origin under the workers' compensation statute, the West Virginia deliberate intent claim is tried to a jury and will be decided under principles of negligence. There is no statutory limit on damages, as is almost universal under state workers' compensation statutes. Large jury awards, based on negligence, are common under this statutory claim.[2] Mr. Russell's employer will thus be exposed to potential tort liability before a West Virginia jury, despite the fact that it negotiated a lump sum settlement with Mr. Russell and his attorney in Kentucky, thereby destroying the *quid pro quo* which is at the heart of the workers' compensation system.

In *Thomas v. Washington Gas Light Company, et al.*, 448 U.S. 261 (1980), this Court overruled *Magnolia Petroleum Co. v. Hunt*, 329 U.S. 430 (1943), which held that the Full Faith and Credit Clause of the United States Constitution precluded an employee who had received a workers' compensation award for injuries received in one state from seeking more workers' compensation benefits in another state. The Court in *Thomas* held that the Full Faith and Credit Clause did not prevent successive workers' compensation awards, because the second state

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[2] West Virginia law allows an injured employee to collect workers' compensation benefits and maintain an action against his employer. Kentucky law, however, requires that the employee elect between receiving workers' compensation benefits or suing his employer; the Kentucky employee cannot do both. K.R.S. 342.610(4); K.R.S. 342.690; *Borman v. Interlake, Inc.*, 623 S.W.2d 912 (Ky. App. 1981).

would have had the authority to grant an award of workers' compensation benefits in the first place. The Court followed the reasoning of *Industrial Commission v. McCartin*, 330 U.S. 662 (1943) and held that a worker could obtain workers' compensation benefits in two states, unless one state included "unmistakable language" in its workers' compensation statute which precluded an award of benefits in a second state.

However, the majority of the Court was uncomfortable with the reasoning that it followed in *McCartin*. The majority wrote that the holding of *McCartin* authorizes a state to directly determine the extraterritorial effect of its workers' compensation awards by using "unmistakable language" in its workers' compensation statute that they are to have effect outside that state. The Court held that the "unmistakable language" rule represented an unwarranted delegation to the states of this Court's responsibility for the final arbitration of Full Faith and Credit questions. In spite of its reservations about its authority being improperly delegated to the states, the Court followed *McCartin* and overruled *Magnolia*, because of principles of stare decisis. The Court was persuaded by the fact that more lower courts had followed *McCartin* than *Magnolia*.

Then – Justice Rehnquist's dissent in *Thomas v. Washington Gas Light Company* pointed out that six members of the Court thought that the *McCartin* decision was "analytically indefensible" and that the remaining three members conceded that it rested on "questionable foundations." The dissent stated the strong belief that *Magnolia* should have been followed and not *McCartin*.

The facts of this case demonstrate why *Magnolia* should have been followed, and why *McCartin* should have been overruled. Kentucky has the contacts with Mr. Russell. He is a long time resident of Kentucky. He has worked for many years for his employer, Bush & Burchett, a Kentucky corporation. His employment was centered in Kentucky and he reported to work there. He was injured on the Kentucky side of the Tug Fork River, and he was hospitalized in Kentucky. He was paid workers' compensation benefits pursuant to the Kentucky statute. The settlement of his claim for workers' compensation benefits was with the advice of his Kentucky lawyer. The Kentucky settlement agreement states that it is in full settlement of all claims. It is an enforceable judgment.

Then – Justice Rehnquist's dissent in *Thomas* recognized that Virginia had a cognizable interest in requiring persons who avail themselves of its statutory authority to eschew other alternative remedies that might have been available to them. Here, Kentucky likewise has an interest in requiring Mr. Russell to eschew a claim for tort-type damages under Kentucky or West Virginia law as part of his settlement accepting benefits under the Kentucky Workers' Compensation Act.

Moreover, this case does not involve a mere successive award of workers' compensation benefits by a second jurisdiction.[3] Rather, it involves the employee's claims for damages over, above, and beyond his workers'

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[3] This case does not involve a successive or second award of workers' compensation benefits, as West Virginia workers' compensation benefits were denied to respondent, apparently on the grounds that his claims were not timely filed.

compensation benefits; damages which, by right and by statute, he is not entitled to following his receipt of Kentucky workers' compensation benefits. See: *Garcia v. American Airlines, Inc.*, 12 F.3d 308, 312 (1st Cir. 1993); *Kelly v. Guyon General Piping, Inc.*, 882 F.2d 108, 110 (4th Cir. 1989); *Woodner v. Mathers*, 210 F.2d 868, 873-79 (D.C. Cir. 1954); K.R.S. 342.610(4); K.R.S. 342.690(1). This case is the perfect opportunity, not only for this Honorable Court to correct *Thomas* and follow *Magnolia*, but to address the issue presented herein regarding injured workers who collect workers' compensation benefits then pursue claims for common-law or tort-type damage awards, as opposed to subsequent awards of supplemental workers' compensation benefits.

The decision of the West Virginia Court, allowing direct action claims when out of state employers have settled workers' compensation claims in their own states, presents daunting practical problems for those employers and their insurers. Out of state employers will be faced with unexpected large losses for which no insurance underwriting was done or for which no reserves were set aside. West Virginia's civil liability system has become infamous. West Virginia tort defendants are fleeing the state because the court system is oriented towards easy and excessive recoveries for plaintiffs. West Virginia's effort to export its direct action claim to be brought against employers in other states, who have tenuous connections to West Virginia, should be seen for what it is – an effort to chase out of state tort defendants and impose

West Virginia's Tort Hell[4] on them. West Virginia's Court and plaintiff's bar seek to replace the tort dollars and contingency fees that they have driven from West Virginia by imposing its unlimited direct action claim on foreign employers.

A. The Application of West Virginia Law to the Respondents' Deliberate Intent Claims Against Bush & Burchett, Inc. and Joe Burchett Violates the Full Faith and Credit Clause of the United States Constitution.

The West Virginia Court's application of West Virginia law to the respondents' deliberate intent claims against Bush & Burchett and Joe Burchett violates the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Full Faith and Credit Clause requires each state to give effect to official acts of other states. A judgment entered in one state must be respected in another provided that the first state had jurisdiction over the parties and the subject matter. *Nevada v. Hall*, 440 U.S. 410, 421 (1979), rehearing denied April 16, 1979. A state statute is a "public act" within the meaning of the Full Faith and Credit Clause. *Carroll v. Lanza*, 349 U.S. 408, 411 (1955); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 154-155; *Alaska Packers Ass'n. v. Industrial Accident Comm.*, 294 U.S. 532 (1935).

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[4] See J. Nordlinger, *Welcome to Tort Hell*, The National Review, August 20, 2001. Appendix, pp. 195-203.

The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of the other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Article IV of the Constitution to prevent. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980); *Nevada v. Hall*, 440 U.S. 410, 424-425 (1979).

For a state's substantive law to be applied in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, so that the choice of its law is neither arbitrary nor fundamentally unfair. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312 (1981), rehearing denied March 2, 1981.

In *Pacific Employers Insurance Co. v. Industrial Accident Comm.*, 306 U.S. 493 (1939), the United States Supreme Court addressed the issue of whether the Full Faith and Credit Clause precluded California from applying its own Workers' Compensation Act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment. The Court held that California was not precluded from applying its own law imposing greater responsibilities on the employer, and in doing so reasoned:

> Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the

> course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. **Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.** 306 U.S. at 502-503 (emphasis added).

Moreover, the Full Faith and Credit Clause does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it. *Id.*, 306 U.S. at 504-505. See also: *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964). Yet, it is this power vested in the Commonwealth of Kentucky that West Virginia is usurping.

1. There is no significant multi-state interest here.

The state where the employee lives and where he was injured has a large and considerable interest in the event. *Crider v. Zurich Insurance Co.*, 380 U.S. 39, 41 (1965). The state where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependence are among these. The state where the employee lives has perhaps a larger concern, for it is there that he is expected to return and it is on his community that the impact of the injury is apt to be most keenly felt. Certainly when the injury occurs in the home state of the employee, the

interest of that state is at least commensurate with the interest of the state in which an injury occurs involving a non-resident. *Crider*, 380 U.S. at 41-42; *Carroll v. Lanza*, 349 U.S. 408, 413 (1955).

West Virginia's sole interest in the case is the contract between Bush & Burchett and the DOH. However, the employment contract at issue in this case is not a contract between Bush & Burchett and the DOH. The employment contract is the contract between respondent Fred Russell and Bush & Burchett, which arises in Kentucky. See: *Kelly v. Guyon General Piping, Inc.*, 882 F.2d 108 (4th Cir. 1989).

2. This case involves an attempt to recover tort damages, not a subsequent workers' compensation award.

The Supreme Court of Appeals of West Virginia's application of West Virginia law in this case is also contrary to generally accepted principles of workers' compensation law. It is generally held that in a damage suit brought in the forum state by an employee against the employer or statutory employer, the forum state will enforce the bar created by the exclusive-remedy statute of a state that is liable for workers' compensation as the state of the employment relation, contract or injury. 4 A. Larson, *Workman's Compensation Law* § 88.11, at 16-133 to 16-139 (1992). It also does not follow that the foreign statute will be disregarded when the employee is trying to get out of the compensation system altogether and back into the common-law damage system. **If the defenses created by the foreign state are not enforced, irremediable harm to the employer is the result.** *Id.*

B. The Application of West Virginia Law Violates the Due Process Rights of Bush & Burchett, Inc. and Joe Burchett.

The Supreme Court of Appeals of West Virginia's ruling attempts to extend not only its adjudicative jurisdiction across state lines into Kentucky, but also to extend West Virginia's legislative jurisdiction. Both are circumscribed by the Due Process Clause of the Fourteenth Amendment. Adjudicative jurisdiction concerns the power of a state to resolve a particular dispute through its court system, while legislative jurisdiction involves the authority of a state to make its law applicable to person or activities. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993). Put more succinctly, legislative jurisdiction refers to both the lawmaking power of a state and the power of a state to apply its laws to any given set of facts, whereas adjudicative jurisdiction is the power of a state to try a particular action in its courts. *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 581 n.3 (8th Cir. 1981), *aff'd*, 454 U.S. 1071 (1981).

A state's adjudicative jurisdiction is circumscribed by the Due Process Clause, see: *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 113 (1987), as is its legislative jurisdiction, see: *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981). There is also a substantial overlap in the analysis employed in determining the presence of each kind of jurisdiction. The standard for deciding whether a court may exercise the adjudicative jurisdiction over a defendant is well-recognized: whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional motions of fair play and substantial

justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The Supreme Court has employed similar language in exploring the Due Process limits on the legislative power of a state, explaining that there must be at least some minimal contact between a state and the regulated subject before it can, consistently with the requirements of Due Process, exercise legislative jurisdiction. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 314 n.2 (1970); see also: *McCluney*, 649 F.2d at 581. The Supreme Court provided a concise test for the exercise of legislative jurisdiction in *Hague*, 449 U.S. at 312-313:

> For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that [application] of its law is neither arbitrary nor fundamentally unfair. See also: *Soo Line Railroad Co. v. Overton*, 992 F.2d 640 (7th Cir. 1993).

West Virginia's attempt to exercise both legislative and adjudicative jurisdiction in this matter violates the Due Process Clause. West Virginia's only contact in this case is the contract by and between Bush & Burchett and the DOH to construct a bridge between West Virginia and Kentucky. However, Bush & Burchett is a Kentucky corporation employing Mr. Russell, a Kentucky resident, the employment relationship is based in Kentucky, it is undisputed that the accident and injuries complained of occurred in Kentucky, and Mr. Russell received Kentucky workers' compensation benefits. West Virginia's hailing the petitioners into court, then applying its own laws to

respondents' claims, clearly offends traditional notions of fair play and substantial justice and defeats the expectations of the parties. At the very least, respondent should have been aware, when he gladly accepted Kentucky workers' compensation benefits, that Kentucky law would be applicable to his claims. Allowing the Supreme Court of Appeals of West Virginia to exercise its adjudicative jurisdiction over this matter is bad enough; to allow it to extend West Virginia law across its territorial limits into Kentucky to a claim between a Kentucky employee and a Kentucky employer arising out of injuries which undisputably occurred in Kentucky is more than a violation of the Due Process Clause; it is an abomination.

The petitioners also contested West Virginia's jurisdiction in the case below, although the Supreme Court of Appeals of West Virginia failed to address this argument. Petitioners reserve the right to argue that West Virginia lacks jurisdiction over this matter and that Kentucky law does not violate West Virginia public policy.

CONCLUSION

This Honorable Court should grant the Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, reverse and vacate the judgment of the Supreme Court of Appeals of West Virginia as expressed in its November 28, 2001 Opinion and January 23, 2002 Order, and reinstate the judgment of the Circuit Court of Kanawha County, West Virginia, which correctly applied the law of the Commonwealth of Kentucky and dismissed the respondents' claims against the petitioners herein.

Respectfully submitted,

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JOE BURCHETT,

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IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

September 2001 Term

No. 28398

FRED RUSSELL, JR., and REBECCA RUSSELL,
Plaintiffs below, Appellants,

v.

BUSH & BURCHETT, INC., a Kentucky corporation;
JOE BURCHETT, an individual; MANITOWAC
CRANES, INC., a Wisconsin corporation;
ESSEX CRANE RENTAL CORPORATION, a New York
corporation; and WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION OF HIGHWAYS,
a public agency of the State of
West Virginia, Defendants below, Appellees,

STATE BOARD OF RISK
AND INSURANCE MANAGEMENT,
Appellee.

and

No. 28720

FRED RUSSELL, JR., and REBECCA RUSSELL,
Plaintiffs below, Appellants,

v.

BUSH & BURCHETT, INC., a Kentucky corporation;
JOE BURCHETT, an individual; MANITOWAC
CRANES, INC., a Wisconsin corporation; ESSEX
CRANE RENTAL CORPORATION, a New York
corporation; and WEST VIRGINIA DEPARTMENT

OF TRANSPORTATION, DIVISION OF HIGHWAYS,
a public agency of the State of West Virginia,
Defendants below, Appellees,

STATE BOARD OF RISK
AND INSURANCE MANAGEMENT,
Appellee.

Appeals from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Jr., Judge
Case No. 97-C-2182

REVERSED AND REMANDED

Submitted: October 3, 2001
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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision of this case.

JUSTICE MAYNARD concurs in part, and dissents in part.

JUDGE MICHAEL THORNSBURY, sitting by special assignment.

SYLLABUS BY THE COURT

1. Whether a deliberate intention cause of action under *W.Va.Code*, 23-4-2(c) [1994] may be brought against an employer because of an injury that occurred in a *situs* other than West Virginia is not determined by the doctrine of *lex loci delicti*, but under the principles of comity.

2. "Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded on essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state. Finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy." Syllabus Point 1, *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1992).

3. There is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project.

4. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in

order that the purpose of providing indemnity not be defeated." Syllabus Point 5, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

5. "The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." Syllabus Point 2, of *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996).

6. The requirement of selecting a "responsible bidder" in *W.Va.Code*, 17-4-19 [2000] does not impose a mandatory duty upon the West Virginia Department of Transportation/Division of Highways ("DOH") to ascertain and take into account the worker safety history or performance of a contractor/bidder; however, this language does require the DOH to ascertain and take reasonable steps to assure the financial responsibility of a contractor/bidder for accidents and injuries to workers on a state-funded project. Such financial responsibility must include full compliance with West Virginia workers' compensation laws, including showing adequate insurance or other resources to cover damages arising from "deliberate intention" claims under *W.Va.Code*, 23-4-2 [1994].

Starcher, J.:

In the instant case, we reinstate a "deliberate intention" personal injury claim that was made by an employee of a bridge construction company against his

employer. The employee was injured while working on the "Kentucky end" of a West Virginia Division of Highways bridge construction project on the Tug Fork River; the circuit court dismissed the claim. We also reverse the circuit court's decision to dismiss the Division of Highways as a defendant in the same case.[1]

I.

Facts & Background

The appellants are Fred Russell and Rebecca Russell, husband and wife. In November of 1996, Mr. Russell, a Kentucky resident, was working for the appellee, Bush & Burchett, Inc., a Kentucky corporation that is owned by the appellee, Joe Burchett. (We will refer to both Mr. Burchett and his company as "B & B.")

B & B had contracted with the appellee, the West Virginia Department of Transportation, Division of Highways ("DOH"), a State agency, to build a bridge for the DOH across the Tug Fork River from Williamson, West Virginia to South Williamson, Kentucky.

While Mr. Russell was working for B & B on the DOH's Tug Fork bridge project, the cable of a crane released, causing an 800-pound "headache ball" to fall and strike Mr. Russell on his head and shoulder. He was knocked off the bridge scaffolding and fell approximately 30 feet onto the rocks and land below; he suffered serious and permanent injuries from the fall.

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[1] Two separate appeals are consolidated in the instant case; we omit separate delineation of the issues involved in each appeal.

Mr. and Mrs. Russell filed suit in the Circuit Court of Kanawha County against several defendants, including B & B and the DOH. The Russells based their claim against B & B on the "deliberate intention" provisions of our workers' compensation law, *W.Va.Code*, 23-4-2(c) [1994].[2]

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[2] *W.Va.Code*, 23-4-2(c) [1994] allows a legal claim against an employer for a work-related death or injury if:

> (i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or
>
> (ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:
>
> (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
>
> (C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly

The Russells based their claim against the DOH on the theory that the DOH was negligent in selecting and retaining B & B as a bridge contractor – because B & B, according to the Russells, allegedly operated unsafely and had a significant history of injuries to workers.

Both the DOH and B & B asked the circuit court to dismiss them as defendants. B & B argued before the circuit court (and it was not disputed by the Russells) that the specific location or *situs* of the accident where Mr. Russell was struck by the headache ball was on the "Kentucky end" of the Tug Fork bridge, and that Mr. Russell landed on the ground in Kentucky. (The parties stipulate that the West Virginia/Kentucky state line is in the middle of the river.) Therefore, argued B & B, West Virginia law, including the provisions of *W. Va.Code*, 23-4-2(c) [1994], does not apply to Mr. Russell's accident.

Specifically, B & B contended that the choice-of-laws doctrine of *lex loci delicti* (the law of the *situs* of the injury

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accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

applies) was applicable and dispositive: if Mr. Russell was injured in Kentucky, Kentucky law applies – and the Russells may not make a deliberate intention claim against B & B under *W.Va.Code*, 23-4-2(c) [1994]. The circuit court, in an order dated February 17, 2000, agreed with B & B's argument and dismissed the Russells' claim against B & B.

The DOH, in support of its request for dismissal, made two arguments. First, the DOH argued that the provisions of *West Virginia Constitution*, Article VI, Section 35[3] barred the Russells from bringing suit against the DOH because exclusionary language in the insurance policy provided for the DOH by the state Board of Insurance [Risk and Insurance Management] ("BRIM") bars claims relating to bridges. Second, the DOH argued that it has no selection or retention duty to with respect to a contractor's worker-safety record or performance; and that even if the DOH did have such a worker-safety-related duty, a breach of that duty could not lead to the DOH having liability in connection with an injury to a worker on a DOH-funded project.

The circuit court did not agree with the DOH's first, "exclusionary language," argument. However, the circuit

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[3]The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

West Virginia Constitution, Article VI, Section 35.

court did agree with the DOH's second, "no duty" argument. Therefore the circuit court dismissed the Russells' claim against the DOH, in an order dated June 1, 2000.

Mr. and Mrs. Russell have appealed the circuit court's dismissal of B & B and the DOH. The DOH has cross-appealed the circuit court's decision that exclusionary language did not bar the Russells' suit. For the reasons discussed below, we vacate the circuit court's dismissals of the DOH and B & B and we remand the case for further proceedings consistent with this opinion.

II.
Standard of Review

The circuit court's rulings regarding the DOH and B & B were rulings granting or denying summary judgment. We review a circuit court's ruling granting a motion for summary judgment *de novo.* Syllabus Point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

III.
Discussion
A.
B & B

The circuit court concluded that the doctrine of *lex loci delicti* precluded the Russells from invoking West Virginia law to make a "deliberate intention" claim against B & B under *W.Va.Code,* 23-4-2(c) [1994].

However, our cases are clear that whether a deliberate intention cause of action under *W.Va.Code,* 23-4-2(c) [1994] may be brought against an employer because of an injury that occurred in a *situs* other than West Virginia is

not determined by the doctrine of *lex loci delicti*, but under the principles of comity. *See Bell v. Vecellio & Grogan*, 197 W.Va. 138, 144-145, 475 S.E.2d 138, 144-145 (1996) (the fact that an accident occurred in Maryland was not dispositive on whether a "deliberate intention" suit would be permitted); *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 302 n.15, 418 S.E.2d 738, 748 n.15 (1992) ("We believe there is more flexibility under comity principles.")[4]

In Syllabus Point 1 of *Pasquale v. Ohio Power Co.*, *supra*, we stated:

> Comity is a court-created doctrine through which the forum court *may* give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded on essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state. Finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy. [emphasis added].

In the instant case, the DOH required in its bidding process – and B & B contractually promised to the DOH in that process – that all Tug Fork bridge project workers

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[4] Courts sometimes use the term "comity" as a shorthand term to explain why a forum court is deferring to the law or rulings of another jurisdiction. However, "comity" is used in Syllabus Point 1 of *Pasquale* in its meaning as a choice-of-laws analytic approach that may lead to either applying *or* declining to apply the law of another jurisdiction.

would be covered by the West Virginia Workers' Compensation Fund and Act.[5] This requirement by the DOH strongly evidences an affirmative public policy of this State, clearly communicated to B & B, that all persons working on the Tug Fork bridge project would have all of the benefits of West Virginia workers' compensation law, including its "deliberate intention" provisions. "[A]ll employees covered by the West Virginia Workers' Compensation Act . . . are subject to every provision of the workers' compensation chapter and are entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to *W.Va.Code*, 23-4-2(c)(2)(I)-(ii)." *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144, 475 S.E.2d 138, 144 (1996).[6]

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[5] *See also* the discussion of the DOH's responsibilities at III.B. *infra*.

[6] *W.Va.Code*, 23-2-1(c) [1993] and regulations of the Fund at 85 C.S.R. 9.6.9 provide a permissible exception for temporary employees – who work in West Virginia for less than 90 days and who are covered by another state's workers' compensation scheme. Assuming *arguendo* that this exception could apply to a person performing work on the Tug Fork bridge project, given the specific terms of the DOH's contract with B & B, the record shows that Mr. Russell had worked for B & B in West Virginia for much longer than 90 days during several years preceding Mr. Russell's injury. Mr. Russell's employment on the West Virginia bridge project was not "temporary" in the sense contemplated by the aforesaid regulations. Mr. Russell did, after his accident, receive some workers' compensation benefits under Kentucky law, apparently because B & B submitted a claim to B & B's Kentucky workers' compensation insurer; but, like the *situs* of the accident, this fact is not dispositive in a comity analysis.

We hold, based on the foregoing, that there is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project. B & B was unquestionably aware of and contractually agreed to comply with this policy. No countervailing factors weigh heavily against applying West Virginia law in this circumstance. Accordingly, the pertinent factors in a comity analysis weigh conclusively on behalf of the Russells being authorized to bring a deliberate intention action against B & B under West Virginia law.

For the foregoing reasons, we reverse the circuit court's grant of summary judgment to B & B.

B.
The DOH

We turn first to the circuit court's determination that *W.Va. Const.*, Art. VI, Sec. 35 did not bar the Russells' claim against the DOH, a determination that the DOH has appealed.

In the instant case, consistent with Syllabus Point 2 of *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983), the Russells asserted in their claim against the DOH that the Russells sought only recovery up to the limits of the DOH's BRIM liability insurance policy.[7]

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[7] We recognized in Syllabus Point 1 (in part) of *Eggleston v. West Virginia Dept. of Highways*, 189 W.Va. 230, 429 S.E.2d 636 (1993) that:

The BRIM policy contained the following exclusionary language:

> Insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of . . . bridges . . . or related or similar activities or things. . . .

The DOH argued to the circuit court that this "bridge related" language excludes the Russells' claim from the

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> *W.Va.Code*, 29-12-5(a) (1986) . . . requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy "shall provide that the insurer shall be barred and estopped from relying upon [*West Virginia Constitution*, Article VI, Section 35.]"

This Court determined following the initial oral argument of this case that it was appropriate to make BRIM a party to this litigation, to reflect our understanding that BRIM, and not the DOH, is the agency that delineates the scope of the coverage that is authorized by *W.Va.Code*, 29-12-5(a) [1993]. However, notwithstanding the statutory role of BRIM, it is axiomatic that the ultimate duty of interpreting and applying the provisions of *West Virginia Constitution*, Article VI, Section 35 lies with this Court. The cases collected at *University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf*, 205 W.Va. 118, 122-123, 516 S.E.2d 741, 745-746 (1998) (*per curiam*) indicate that establishing the applicability and parameters of *West Virginia Constitution*, Article VI, Section 35 in a given case involves the consideration of a range of factors, including: other constitutional provisions; principles of *stare decisis;* expressions and conduct by the legislative and executive branches; principles of equity; and the inherent duties and powers of the judicial branch.

BRIM policy coverage. The Russells responded by arguing that the "bridge related" exclusionary language does not apply to the Russells' claim against the DOH – because the Russells' liability theory against DOH is based on allegedly negligent selection and retention conduct by the DOH, not bridge construction, installation, etc.

Faced with these competing positions, the circuit court adopted the position advanced by the Russells. The circuit court therefore denied the DOH's motion to dismiss the Russells' claim against the DOH as being entirely barred by *W.Va. Const.*, Art. VI, Sec. 35; and it is this decision that the DOH has cross-appealed and that we review.

The principles of interpretation, construction, and application that this Court brings to exclusionary language in insurance policies are well-settled, and were stated in the following Syllabus Points of *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987):

> 5. Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.
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> 7. An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.
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> 8. With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of

insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

9. Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted.

10. An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.[8]

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[8] The exclusionary language principles set forth in *National Mut. Ins. Co. v. McMahon & Sons, Inc., supra,* have been developed primarily in situations where people who have purchased insurance coverage are arguing that they expected and are entitled to coverage that will protect them against losses. However, in the instant case, the DOH is asserting that they do *not* have coverage under the BRIM policy

> because [the DOH relies on the principle that a lawsuit based on State] activity that is "not covered" by insurance is [barred by *W.Va. Const.,* Art. VI, Sec. 35.].[T]he system inadvertently creates an incentive . . . to argue at every opportunity that a given activity is not covered. . . . This sentiment, which is the perverse opposite of the desires of a normal insured party who wants maximum coverage in an accident, runs counter to the goals of risk spreading and protection from catastrophic loss that our law has come to favor.

Ayersman v. Division of Environmental Protection, 208 W.Va. 544, ___, 542 S.E.2d 58, 63 (2000) (McGraw, J. concurring.) *See* note 7 *infra* where we emphasize that it is BRIM and not a particular state agency that is charged with establishing the parameters of

We stated in Syllabus Point 2 of *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) (a case that dealt with local government, not State, liability, and with the local government liability statutes, *W.Va.Code*, 29-12A-1 *et* seq.):

> The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.[9]

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coverage. Where the consequences of a particular claim not falling within the ambit of coverage that is afforded by a state insurance policy may include the effect of prohibiting a person from maintaining a case against the State in court, the person asserting a claim against the State obviously has standing to assert the existence of coverage. Additionally, although we do not decide the issue, we are inclined to the opinion that when there has been a final court determination that a party's claim in court against the State is barred by the provisions of *West Virginia Constitution*, Article VI, Section 35, if that party thereafter files a claim in the West Virginia Court of Claims, equitable and constitutional principles argue that any applicable periods of limitation or repose should be tolled for the period during which the party's claim was pending in court.

[9] 140 years ago, our nation's 16th President said:

> It is as much the duty of government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals.

Abraham Lincoln, December 3, 1861, first annual State of the Union message.

In connection with State liability, the Legislature, in authorizing BRIM to create the policy that is at issue in the instant case, stated:

> Recognition is given to the fact that the state of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that the state and its officials, agents and employees engage in many governmental activities and services and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, destruction, risks and hazards and such activities and responsibilities are subject to liabilities which can and should be covered by a sound and adequate insurance program;

W.Va.Code, 29-12-1[1994] *Id.* (emphasis added).[10]

W.Va.Code, 29-12-1 [1994] evidences a remedial legislative purpose that the State establish mechanisms that will assure that the State is financially responsible and accountable for injuries occasioned by culpable State action. That remedial purpose must be given substantial

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[10] We stated in *Parkulo v. West Virginia Bd. of Probation and Parole,* 199 W.Va. 161, 175-176, 483 S.E.2d 507, 521-522 (1996):

> [W]e note that the Legislature may direct such limitation or expansion of the insurance coverages and exceptions applicable to cases brought under *W.Va.Code,* 29-12-5 as, in its wisdom, may be appropriate. The Legislature has also vested in the State Board of Insurance (Risk and Insurance Management) considerable latitude to fix the scope of coverage and contractual exceptions to that coverage by regulation or by negotiation of the terms of particular applicable insurance policies.

weight – along with the foregoing principles that narrowly construe exclusionary policy language and favor governmental tort liability – in examining, applying, and interpreting the exclusionary language in the DOH policy.

Applying the foregoing principles, we believe the circuit judge was correct in concluding that the "bridge related" exclusionary language of the DOH's policy did not as a matter of law bar the Russells' claim against the DOH. Any negligence in the DOH's bidder selection process was separate and remote in time and place from and anterior to any bridge construction. While bidder selection and retention could be arguably said to be "related" to bridge construction, such a "relatedness" connection could also be made to the most distant and tenuous activities. Applying the principles of law that narrowly construe exclusionary language, that favor liability over immunity, and that favor state accountability, we cannot read the DOH policy language as categorically excluding the Russells' claim. Therefore we affirm the circuit judge's refusal to dismiss the DOH on the basis of the exclusionary language.

However, the fact that exclusionary language does not bar the Russells' negligent selection and retention claim against the DOH does not mean that the DOH has duties related to worker safety in connection with selecting and retaining a contractor, that can run to a worker on a DOH-funded project. This is the issue on which the circuit court ruled for the DOH, and on which the Russells have appealed.

Specifically, the Russells claim that the DOH has a "due care" duty to select and retain a contractor that does not expose workers on a state-funded project to unreasonable dangers and risks.[11] The Russells principally derive this asserted duty from *W.Va.Code*, 17-4-19 [2000], that requires the DOH to award contracts to a "responsible bidder:"

> . . . the contract for the work, or for the supplies or materials required therefor shall, if let, be awarded by the commissioner to the lowest *responsible bidder* for the type of construction selected.

Id.

The Russells do not cite us to any case, from West Virginia or otherwise, that has held that such general "responsible bidder" language, commonly found in public works contracting law, imposes a specific and mandatory duty upon a public agency like the DOH to ascertain and take into account a company's worker safety history and performance.

While the DOH disputes the Russells' position, the DOH does acknowledge that the DOH's evaluation of a contractor's responsibility should and does include ascertaining and assuring that a bidder/contractor is fully financially responsible for liabilities arising out of accidents and injuries to workers.

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[11] Under some circumstances, courts have allowed negligent selection and retention claims to be made by employees of a contractor against the party that selected the contractor. *See Bagley v. Insight Communications*, 658 N.E.2d 584 (Ind.1995).

We have held that under statutes like *W.Va.Code,* 17-4-19 [2000] and "responsible bidder" language, a government agency has substantial discretion in establishing criteria for determining bidder responsibility. Syllabus Point 5, *Pioneer Co. v. Hutchinson,* 159 W.Va. 276, 220 S.E.2d 894 (1975). Thus, the DOH presumably would not exceed its authority by including specific worker-safety-related criteria within its ambit of concern in evaluating bidders and contractors.

But the discretion afforded to the DOH by the general "responsible bidder" language of *W.Va.Code,* 17-4-19 [2000] does not afford this Court a similar discretion to judicially impose a broad and novel duty in the area of worker safety upon the DOH. We do note, however, that the worker-safety-related duties that the DOH does not dispute having – assuring that a contractor is financially responsible and accountable to injured workers – do benefit workers on state-funded projects like Mr. Russell. This duty is also consistent with the public policy of assuring full financial accountability for injuries to workers on State-funded projects that we discussed in III.A *infra.*

We hold, therefore, that the requirement of selecting a "responsible bidder" in *W.Va.Code,* 17-4-19 [2000] does not impose a mandatory duty upon the West Virginia Department of Transportation/Division of Highways ("DOH") to ascertain and take into account the worker safety history or performance of a contractor/bidder; however, this language does require the DOH to ascertain and take reasonable steps to assure the financial responsibility of a contractor/bidder for accidents and injuries to workers on a state-funded project. Such financial

responsibility must include full compliance with West Virginia workers' compensation laws, including showing adequate insurance or other resources to cover damages arising from "deliberate intention" claims under *W.Va.Code*, 23-4-2 [1994].

In the instant case, the circuit court's dismissal of the DOH was based on the court's conclusion as a matter of law that although the BRIM policy did not exclude the Russells' claim, the DOH had no worker-safety-related duties that could inure to Mr. Russell's benefit.

However, we have held that the DOH does have the duty of assuring a contractor's financial responsibility and accountability for worker injuries and accidents; and we cannot say as a matter of law that the breach of this duty cannot under any circumstances give rise to a negligent selection or retention claim by a worker on a DOH-funded project. The record before this Court does not provide a basis for determining whether the DOH may have breached this duty in the instant case. We therefore reinstate the Russells' claim against the DOH and remand the case for consideration under the foregoing principles.[12]

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[12] The parties also submit arguments in their briefs regarding rulings by the circuit court relating to independent contractor status, the public duty doctrine, the *Restatement of Torts*, qualified immunity, and indemnification. We decline to address those issues at this time, in part because they may be mooted as a result of further proceedings.

IV.
Conclusion

The dismissals of the DOH and B & B are vacated and the instant case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FRED RUSSELL, JR.
and REBECCA RUSSELL,

Plaintiffs,

v. **CIVIL ACTION NO. 97-C-2182**

BUSH & BURCHETT, INC., a Kentucky corp., JOE BURCHETT, an individual, MANITOWAC CRANES, INC., a Wisconsin corp., ESSEX CRANE RENTAL CORP., a New York corp., and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia,

Defendants.

ORDER

(Filed Feb. 17, 2000)

On October 22, 1999, came the parties, plaintiffs, Fred Russell, Jr. and Rebecca Russell, by counsel, Lori A. Simpson-Davis, Esquire; defendants, Bush & Burchett, Inc. and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire; and defendant, West Virginia Department of Transportation, Division of Highways, by counsel, Gary Pullin, Esquire, and Theresa M. Kirk, Esquire, for hearing on the Motion for Summary Judgment of defendants, Bush & Burchett, Inc., and Joe Burchett. Having heard and considered the positions and arguments of the parties, having reviewed the plaintiffs objections to the proposed order tendered by the defendants, Bush &

Burchett, Inc. and Joe Burchett, and the proposed findings of facts and conclusions of law submitted by the plaintiffs for this Courts consideration, this Court is of the opinion that this matter is proper for Summary Judgment, and in the Court's opinion there being no genuine issue of material fact presented and the issues to be decided involving only questions of law.

This Court makes the following findings of fact:

1) Plaintiff, Fred Russell, Jr., was, at all times relevant to the matters herein, a Kentucky resident;

2) Plaintiff was an employee of Bush & Burchett, Inc., at all times relevant to the matters herein;

3) Bush & Burchett, Inc., is a Kentucky corporation with its principal place of business located in Kentucky;

4) Defendant Joe Burchett is the president of Bush & Burchett, Inc.;

5) The November 1, 1996, accident giving rise to this matter occurred in Kentucky; and,

6) Plaintiff was eligible for and received Workers' Compensation benefits from the employer, Bush & Burchett, Inc.'s, Kentucky Workers' Compensation carrier.

This Court makes the following conclusions of law:

1) Under the doctrine of *lex loci delicti* the substantive rights between the parties are to be determined by the law of the place of the injury. Here, because there is no genuine issue of material fact that plaintiff's injury occurred in Kentucky, the law of Kentucky applies to plaintiffs' claims against Bush & Burchett, Inc., and Joe Burchett.

2) Under Kentucky law, an employee may elect to receive Workers' Compensation benefits, or may opt not to accept benefits and pursue an action against the employer. However, the employee who elects to receive Workers' Compensation benefits in Kentucky is barred from pursuing an action against his employer. K.R.S. 342.690(1) (1993). Therefore, because plaintiff received Workers' Compensation benefits from his employer's Kentucky carrier, Kentucky law bars this action against his employer, Bush & Burchett, Inc.

3) Kentucky law also bars plaintiffs' action against Joe Burchett, individually, because as the president of Bush & Burchett, Inc., Mr. Burchett is subject to the same immunity from suit as is Bush & Burchett, Inc., as plaintiff's employer.

4) Because this matter involves a Kentucky employee of a Kentucky contractor who was injured in Kentucky and who received Workers' Compensation benefits in Kentucky, the case of *Bell v. Vecellio and Grogan, Inc.*, 475 S.E.2d 138 (W.Va. 1996), cited by plaintiffs, is inapplicable to the matter herein.

5) Even if West Virginia law was held to be applicable to plaintiffs' claims, the result would be the same: plaintiffs' claims must be dismissed. The facts of this matter fall within West Virginia Code § 23-2-1c(c), which provides:

> If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter

> on the count of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on a count of such injury, disease or death.

6) West Virginia Code § 23-2-1c(c) makes the compensation law of another state the exclusive remedy against the employer for a non-resident employee who is temporarily employed in this state, if such an employee is injured in this state and is covered by his or her employer's Workers' Compensation in the other state. Syl. Pt. 3, *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991).

7) Therefore, where, as here, a non-resident employee such as plaintiff Mr. Russell is subject to the Workers' Compensation law of Kentucky, the non-resident employee's rights against his employer would be exclusively under the laws of the foreign state, and no remedy would be available against that employer in West Virginia under our deliberate intention statute, West Virginia Code § 23-4-2(c)(ii). Syl. Pt. 2, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996).

8) Therefore, this Court concludes that West Virginia law would also result in the dismissal of plaintiffs' claims against Bush & Burchett, Inc. West Virginia law would also result in the dismissal of plaintiffs' claims against Joe Burchett, individually. West Virginia Code § 23-2-6a.

9) The contract in effect between Bush & Burchett, Inc., and the West Virginia Department of Transportation,

Division of Highways, does not require Bush & Burchett, Inc., to cover its employees under the West Virginia Workers' Compensation Fund. Rather, the contract only requires that Bush & Burchett, Inc., protect its employees in compliance with the West Virginia Workers' Compensation Act. By providing protection for its employees by providing Workers' Compensation coverage in Kentucky, Bush & Burchett, Inc., complies with the Workers' Compensation Act and complies with its contract with the Division of Highways. Furthermore, the contract between Bush & Burchett, Inc., and the Division of Highways does not create a private cause of action for plaintiffs under the West Virginia Workers' Compensation Act. *Lester v. State Workmen's Compensation Commissioner,* 245 S.E.2d 443 (W.Va. 1978).

10. To the extent the Motion for Summary Judgment of defendants, Bush & Burchett, Inc., and Joe Burchett, also seeks the dismissal of plaintiffs' claims for punitive damages against them, the Motion is moot; plaintiffs' claims for punitive damages having been withdrawn.

WHEREFORE, it is hereby **ORDERED, ADJUDGED and DECREED** that the Motion for Summary Judgment of defendants, Bush & Burchett, individually, be, and is hereby **GRANTED,** and the plaintiffs' claims as set forth in plaintiffs' Complaint, and any and all subsequently filed Amended Complaint or Complaints, against defendants, Bush & Burchett, Inc., and Joe Burchett, individually, are hereby **DISMISSED,** with prejudice. The exceptions and objections of the plaintiffs hereto are duly noted and preserved.

It is hereby further **ORDERED** that the Clerk shall return certified copies of this Order to counsel of record.

ENTER this 17th day of February, 2000.

/s/ Paul Zakaib, Jr.
PAUL ZAKAIB, JR.,
CIRCUIT JUDGE

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd day of January 2002, the following order was made and entered:

Fred Russell, Jr., and Rebecca Russell, Plaintiff Below, Appellants

vs.) No. 28398

Bush & Burchett, Inc., a Kentucky corporation, Joe Burchett, an individual, Manitowac Cranes, Inc., a Wisconsin corporation, Essex Crane Rental Corporation, a New York corporation, and West Virginia Department of Transportation, Division of Highways, a public agency of the State of West Virginia, Defendants Below, Appellees

State Board of Risk and Insurance Management, Appellee

AND

Fred Russell, Jr., and Rebecca Russell, Plaintiffs Below, Appellants

vs.) No. 28720

Bush & Burchett, Inc., a Kentucky corporation, Joe Burchett, an individual, Manitowac Cranes, Inc., a Wisconsin corporation, Essex Crane Rental Corporation, a New York corporation, and West Virginia Department of Transportation, Division of Highways, a public agency of the State of West Virginia, Defendants Below, Appellees

State Board of Risk and Insurance
Management, Appellee

The Court, having maturely considered the petition for rehearing filed by the appellees, Bush & Burchett, Inc., a Kentucky corporation, and Joe Burchett, by Offutt, Fisher & Nord, and Scott W. Andrews, their attorneys, in the above-captioned proceedings, doth hereby refuse said petition for rehearing. Justice Davis disqualified. Judge Thornsbury sitting by temporary assignment.

A True Copy

Attest: /s/ Rory F. Perry II
Clerk Supreme Court
of Appeals

K.R.S. 342.690 Exclusiveness of liability

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee officer or director.

(2) If an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury may claim compensation under this chapter and in addition may maintain an action at law or in admiralty for damages on account of such injury or death, provided that the amount of compensation shall be credited against the amount received in such action, and provided that if the amount of compensation is larger than the amount of damages received, the amount of damages less the employee's legal fees and expenses shall be credited against the amount of compensation. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risks of his employment, or that the injury was due to the contributory negligence of the employee.

(3) An employer shall retain all common law defenses against any action by an employee who elects not to be covered, as provided under subsection (6) of KRS 342.650.

W. Va. Code

§ 23-2-1c. Extraterritorial coverage; approval and change of agreements.

(a) Whenever, with respect to an employee of an employer who is a subscriber in good standing to the workers' compensation fund or an employer who has

elected to pay compensation directly, as provided in section nine [§ 23-2-9] of this article, there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is performed or is to be performed in a state or states other than this state, the employer and the employee may agree to be bound by the laws of this state or by the laws of such other state in which all or some portion of the work of the employee is to be performed: Provided, That the commissioner shall have the authority to review and accept or reject any such agreement. Any such review shall be conducted in keeping with the commissioner's fiduciary obligations to the workers' compensation fund which may include, among other things, the nexus of the employer and the employee to the state: Provided, however, That nothing in this section shall be construed so as to require such an agreement in those instances where subdivision (3), subsection (b), section one [§ 23-2-1(b)(3)] of this article or subdivision (1), subsection (a), section one-a [§ 23-2-1a(a)(1)] of this article are applicable. Such agreement shall be in writing and filed with the commissioner within ten days after execution thereof but shall not become effective until approved by the commissioner and shall, thereafter, remain in effect until terminated or modified by agreement of the parties similarly filed or by order of the commissioner. If the parties agree to be bound by the laws of this state, an employee injured within the terms and provisions of this chapter shall be entitled to benefits under this chapter regardless of the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease, and the rights

of the employee and his or her dependents under the laws of this state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and as a result of the employment.

(b) If the parties agree to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his or her dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and as a result of the employment without regard to the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease.

(c) If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of the state other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter on account of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease or death.

(d) If any employee or his or her dependents be awarded workers' compensation benefits or recover damages from the employer under the laws of another state for an injury received in the course of and resulting from the employment, the amount so awarded or recovered, whether paid or to be paid in future installments, shall be

credited against the amount of any benefits payable under this chapter for the same injury.

W. Va. Code

§ 23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; "deliberate intention" defined.

(a) Notwithstanding anything hereinbefore or hereinafter contained, no employee or dependent of any employee is entitled to receive any sum from the workers' compensation fund, or to direct compensation from any employer making the election and receiving the permission mentioned in section nine [§ 23-2-9], article two of this chapter, or otherwise under the provisions of this chapter, on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of such employee. For the purpose of this chapter, the commissioner may cooperate with the office of miners' health, safety and training and the state division of labor in promoting general safety programs and in formulating rules to govern hazardous employments.

(b) If injury or death result to any employee from the deliberate intention of his or her employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter, and has a cause of action against the employer, as if this chapter had not been enacted, for

any excess of damages over the amount received or receivable under this chapter.

(c)(1) It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a co-employee; that the immunity established in sections six and six-a [§§ 23-2-6 and 23-2-6a], article two of this chapter, is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workers' compensation system except as herein expressly provided; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard or willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

(2) The immunity from suit provided under this section and under section six-a [§ 23-2-6a], article two of this chapter, may be lost only if the employer or person

against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation of proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in a workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to

the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

(iii) In cases alleging liability under the provisions of the preceding paragraph (ii):

(A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

(B) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts

required to be proven by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii); and

(C) The provisions of this paragraph and of each subparagraph thereof are severable from the provisions of each other subparagraph, subsection, section, article or chapter of this code so that if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this act and this code remain valid.

(d) The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three does not in any way affect the right of any person to bring an action with respect to or upon any cause of action which arose or accrued prior to the effective date of such reenactment.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FRED RUSSELL, JR. and REBECCA RUSSELL, Plaintiffs, v. BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWAC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP. a New York corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia, Defendants.	CIVIL ACTION NO. 97-C-2182

NOTICE OF HEARING

Please take notice that the undersigned counsel will bring the attached "Motion for Summary Judgment of Defendants Bush & Burchett, Inc., and Joe Burchett, Individually," and "Memorandum in Support of Motion for Summary Judgment of Defendants Bush & Burchett, Inc., and Joe Burchett, Individually," on for hearing before The Honorable Paul Zakaib, Jr., presiding, on Friday, October 1, 1999, at 9:00 a.m., at which time you may be present to protect your interests, if any.

BUSH & BURCHETT, INC., AND JOE BURCHETT,

BY COUNSEL,

D.C. Offutt, Jr., Esquire (#2773)
Scott W. Andrews, Esquire(#5772)
Offutt, Fisher & Nord
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FRED RUSSELL, JR. and REBECCA RUSSELL, Plaintiffs, v. BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWAC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP. a New York corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia, Defendants.	)	CIVIL ACTION NO. 97-C-2182

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BUSH & BURCHETT, INC., AND JOE BURCHETT, INDIVIDUALLY

Now come the defendants, Bush & Burchett, Inc. (hereinafter "Bush & Burchett"), and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire, and Offutt, Fisher & Nord, and with their Motion for Summary Judgment pursuant to Rule 56 of West Virginia Rules of Civil Procedure, hereby state as follows:

1. This case arises out of a November 1, 1996, accident in which plaintiff Fred Russell, Jr., was allegedly injured when struck by the headache ball of a crane

which allegedly caused him to fall approximately thirty (30) feet to the ground while in the course and scope of his employment with Bush & Burchett.

2. The project in progress at the time of plaintiff's accident consisted of building two (2) bridges between Pike County, Kentucky, and Mingo County, West Virginia, and involved work in both West Virginia and Kentucky. At the time of the accident, the evidence is undisputed that the crane involved in the accident was located in Kentucky, and that plaintiff was in Kentucky.

3. Plaintiff is and was at all times relevant to this matter a Kentucky resident. Bush & Burchett is a Kentucky corporation. Joe Burchett is the president of Bush & Burchett. Following the accident, plaintiff received Kentucky Workers' Compensation benefits.

4. Based on the facts and circumstances presented herein, Kentucky law should be applied to this action by the plaintiffs against Bush & Burchett and Joe Burchett. *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997); *Blais v. Allied Exterminating Co.*, 482 S.E.2d 659 (W.Va. 1996); *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986).

5. The application of Kentucky law to this action should result in the dismissal of plaintiffs' claims against both Bush & Burchett and Joe Burchett. K.R.S. 342.690 (1993).

6. Moreover, even if this Honorable Court holds that West Virginia law applies to plaintiffs' claims, West Virginia law also mandates the dismissal of plaintiffs' claims against Bush & Burchett and Joe Burchett. West

Virginia Code § 23-2-1c; *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996); *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991).

7. Alternatively, even if this Honorable Court does not completely dismiss plaintiffs' claims against defendants Bush & Burchett and Joe Burchett, individually, this Honorable Court must dismiss plaintiffs' claims for punitive damages against these defendants. West Virginia Code § 23-4-2(c)(iii)(A).

8. A Motion for Summary Judgment should be granted when it is clear that there is no genuine issue of fact to be tried and an inquiry concerning the facts is not desirable to clarify the application of the law. Rule 56, West Virginia Rules of Civil Procedure.

WHEREFORE, for all of the foregoing reasons and for the reasons set forth in the defendants' Memorandum in Support of Motion for Summary Judgment, filed contemporaneously herewith, defendants, Bush & Burchett, Inc., and Joe Burchett, by counsel, hereby respectfully request that this Honorable Court grant their Motion for Summary Judgment and dismiss, with prejudice, all of the plaintiffs' claims against them, for an award of their costs and attorneys' fees incurred in the defense of this action, and for such other relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,
BUSH & BURCHETT, INC.,
BY COUNSEL,

D. C. Offutt, Jr., Esquire (#2773)
Scott W. Andrews, Esquire(#5772)
Offutt, Fisher & Nord
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Huntington, West Virginia 25728-2868
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FRED RUSSELL, JR. and REBECCA RUSSELL, Plaintiffs, v. BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWAC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP. a New York corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia, Defendants.	CIVIL ACTION NO. 97-C-2182

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BUSH & BURCHETT, INC., AND JOE BURCHETT, INDIVIDUALLY

Now come the defendants, Bush & Burchett, Inc. (hereinafter "Bush & Burchett"), and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire, and Offutt, Fisher & Nord, and with their Memorandum in Support of Motion for Summary Judgment pursuant to Rule 56 of West Virginia Rules of Civil Procedure, hereby state as follows:

I. INTRODUCTION

Some of the issues raised herein were initially raised in defendants Bush & Burchett, Inc., and Joe Burchett's Motion to Dismiss, filed on or about October, 1997, and which was the subject of a hearing held before this Honorable Court on or about January 14, 1998. However, that Motion to Dismiss was filed and the hearing held prior to the commencement of discovery in this matter. Although the current counsel for Bush & Burchett and Joe Burchett was not involved in this litigation at that time, current counsel for these defendants understands that this Honorable Court allowed these defendants to revisit these issues following discovery. Given the fact that discovery has been conducted and there are no genuine issues of material fact regarding the issues raised herein, these defendants hereby file this Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment, and request this Honorable Court grant their Motion for Summary Judgment and dismiss plaintiffs' claims against them, with prejudice.

II. FACTUAL BACKGROUND

This case arises out of a November 1, 1996, accident in which plaintiff Fred Russell, Jr., was allegedly injured when struck by the headache ball of a crane which allegedly caused him to fall approximately thirty (30) feet to the ground while in the course and scope of his employment with Bush & Burchett.

The project in progress at the time of plaintiff's accident consisted of building two (2) bridges between Pike County, Kentucky, and Mingo County, West Virginia, and

involved work in both West Virginia and Kentucky. At the time of the accident, the evidence is undisputed that the crane involved in the accident was located in Kentucky, and that plaintiff was in Kentucky.

Bush & Burchett is a Kentucky corporation which maintains its corporate headquarters in Allen, Floyd County, Kentucky. Defendant Joe Burchett is the president of Bush & Burchett. See: Affidavit of Joe Burchett attached hereto as Exhibit A. Mr. Burchett had no specific responsibility or duties for the Goodman Bridge project after being awarded the bid for the project by the West Virginia Division of Highways (hereinafter WVDOH). Prior to receiving the bid, Mr. Burchett assisted Bush & Burchett personnel in setting the price for the bid to the WVDOH. *Id.* Once work on the project actually began, Bush & Burchett's project manager for the Goodman Bridge project was John Ward and the superintendent was Everett Bourland. Mr. Bourland was responsible for Bush & Burchett's day-to-day operations on the Goodman Bridge project. *Id.* Mr. Burchett's only responsibility for the Goodman Bridge project was a general responsibility as president of Bush & Burchett. *Id.*

As president of Bush & Burchett, Mr. Burchett visited the Goodman Bridge project site approximately once weekly to monitor the project's progress and to determine if there were any problems which required his assistance. On such visits, he would be present at the site for as little as a few minutes or for as much as a few hours, but never for more than one-half (1/2) of the work day. *Id.* When present at the Goodman Bridge project job site, Mr. Burchett generally spoke with Mr. Bourland and Mr. Ward. He did not direct or instruct any hourly

employees as to what to do or how to do any particular job or task. *Id.*

Mr. Burchett never directed or instructed plaintiff Fred Russell, Jr., as to what to do or how to do any particular aspect of his job on the Goodman Bridge project or otherwise. *Id.* Mr. Burchett also never instructed Kenny Smith or any other crane operator on the Goodman Bridge project as to what to do or how to do any particular aspect of his job. *Id.*

Moreover, on each occasion Mr. Burchett may have visited the Goodman Bridge project, he was present solely in his capacity as president of Bush & Burchett and at all times was acting within the course and scope of his employment and/or duties as president of Bush & Burchett. *Id.* Mr. Burchett never visited the Goodman Bridge project job site in an individual capacity and never acted in an individual capacity separate and apart from his duties on behalf of Bush & Burchett. *Id.* Mr. Burchett was not present at the job site on November 1, 1996, the date of plaintiff's accident. *Id.*

There is no question that on November 1, 1996, plaintiff, Fred Russell, Jr., was employed by Bush & Burchett and was working on Job 159, which was also known as the Goodman Bridge project. The location of plaintiff's accident, which will be discussed further, *infra*, was south of Kentucky Route 292, in Pike County, Kentucky, consistent with the interstate nature of the Goodman Bridge project. Bush & Burchett has employed Fred Russell, Jr., for a number of years. See: Affidavit of Vickie Ward attached hereto as Exhibit B. Mr. Russell lives at 4374 Coon Creek, Salyersville, Kentucky. *Id.* (For the sake of

brevity, the sub-exhibits referred to in Ms. Ward's Affidavit are omitted herein, but are available upon request.) On the Goodman Bridge project, plaintiff would travel each day from his home in Salyersville, Kentucky, with a co-worker in a company truck to the Job 159 job site. See: Affidavit of John Ward attached hereto as Exhibit C. Once there, plaintiff would report for work depending on the phase of construction of the project. *Id.*

The men were paid according to which side of the bridge was worked, pursuant to regulations from the West Virginia Department of Labor, the Kentucky Department of Labor, and the United States Department of Labor. See: Exhibit B, Affidavit of Vickie Ward. As a result, there are clear records which show the location of work for purposes of payroll for the plaintiff. A more complete review of the reports clearly shows that for the six (6) months prior to his injury, plaintiff worked on three (3) different projects as an employee of Bush & Burchett: (1) plaintiff was employed as a carpenter and ironworker on Job 159, the Goodman Bridge project, on both the West Virginia side and the Kentucky side; (2) plaintiff was employed as a carpenter on Job 156 in Johnson County, Kentucky; and, (3) plaintiff was employed as a carpenter on Job 145 in Pike County, Kentucky. See: Exhibit B. When the full picture of plaintiff's employment with Bush and Burchett is analyzed, it is clear that plaintiff was a regularly employed Kentucky employee and that this designation, according to applicable law and coverages, makes plaintiffs' claim compensable in the Commonwealth of Kentucky rather than in West Virginia.

Plaintiff has also confirmed that his accident occurred in Kentucky. Plaintiff testified that the area where he was working at the time of his accident was in Kentucky, and that the area where he fell after being struck by the crane was in Kentucky. See: April 28, 1999 deposition of Fred Russell, Jr., Volume I at p. 29, Volume III at pp. 24-25. A copy of the cited portions of Mr. Russell's deposition is attached hereto as Exhibit D. Mr. Russell also confirmed that he always resided in Kentucky during the time he worked for Bush & Burchett. Depo. Russell, Vol. III, pp. 45, 61. Further evidence of Mr. Russell's domicile in the Commonwealth of Kentucky is indicated by his testimony that he always filed for unemployment benefits in Kentucky. *Id.* at p. 65. Mr. Russell also received Kentucky Workers' Compensation benefits following this accident, and his medical bills were paid by Kentucky Workers' Compensation. Depo. Russell, Vol. I, p. 108.

Bush & Burchett employee, Kenny Smith, the operator of the crane involved in plaintiff's unfortunate accident, also testified that the crane was located in Kentucky at the time of plaintiff's accident. See: July 26, 1999 deposition of Kenneth Smith at pp. 206-207. A copy of the cited portions of Mr. Smith's deposition is attached hereto as Exhibit E.

After Mr. Russell's November 1, 1996, work place injury, Mr. Russell received compensation payments from Bush & Burchett's Kentucky carrier, the Kentucky Associated General Contractor's Self-Insurance' Fund, beginning on November 18, 1996. See: Affidavit of Alice Howard attached hereto as Exhibit F. This payment paid compensation back to November 2, 1996, the day after the

injury. *Id.* Each of these checks, sent weekly, clearly identified the source of payment and are each endorsed and cashed by the plaintiff, Fred Russell, Jr. *Id.* Prior to receiving benefits from the Kentucky Associated General Contractor's Self-Insurance Fund, plaintiff participated in a telephone interview with the carrier and then filled out Kentucky Form 113 in order to designate physicians. *Id.* As such, it is difficult for plaintiff to argue that he was unaware that he was receiving compensation from the Kentucky carrier or that he had no opportunity to make a claim for West Virginia benefits. In fact, the West Virginia Workers' Compensation Appeal Board recently affirmed the ruling of the Workers' Compensation Office of Judges holding that plaintiff's claim for West Virginia Workers' Compensation benefit was not compensable. A copy of the Order of the Workers' Compensation Appeal Board is attached thereto as Exhibit G.

The facts cited above are undisputed. There is no genuine issue of material fact relevant to the issues herein, which are questions of law for this Honorable Court. No genuine issues of fact remain for trial. The defendants' Motion for Summary Judgment must be granted, and the plaintiffs' claims dismissed.

III. ARGUMENT

A. Summary Judgment Standard.

As a general rule, a Motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 1, *Miller v. City Hospital, Inc.*, 475 S.E.2d 495

(W.Va. 1996); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995); Syl. Pt. 2, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). Rule 56(c) of the West Virginia Rules of Civil Procedure (hereinafter "WVRCP") provides, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Moreover, summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact [sic] find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 2, *Miller v. City Hospital, Inc.*, 475 S.E.2d 495 (W.Va. 1996); Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995). If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the non-moving party who must either (1) rehabilitate the evidence attached by the moving party, (2) produce additional evidence showing the existence of a genuine issue of a trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Syl. Pt. 3, *Miller*; Syl. Pt. 3, *Williams*. WVRCP Rule 56(e) also states in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Furthermore, mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue of a trial. *Id.* In the current situation, no conflicting material facts or disputed material facts have been presented, and reasonable minds can draw but one (1) conclusion from the facts presented. There is no basis for a verdict in this case against Bush & Burchett and Joe Burchett in favor of the plaintiffs. Bush & Burchett and Joe Burchett are entitled to judgment against the plaintiffs as a matter of law. No further fact inquiry is necessary or desirable.

B. Kentucky Law Should Apply to Plaintiffs' Claims Against Bush & Burchett and Joe Burchett.

Clearly, the inescapable conclusion reached when examining the facts of this case is that Kentucky law must be applied to plaintiffs' claims against defendants Bush & Burchett and Joe Burchett. The evidence is undisputed that Bush & Burchett is a Kentucky corporation. Joe Burchett is the president of Bush & Burchett and also resides

in Kentucky. Plaintiff is a lifetime resident of the Commonwealth of Kentucky, specifically, Salyersville, Kentucky. This Kentucky employee of a Kentucky employer was provided Workers' Compensation benefits in the Commonwealth of Kentucky by a Kentucky insurance carrier. Finally, and most importantly, the evidence is undisputed that the location of plaintiff's injury was Pike County, Kentucky.

The mere fact that plaintiff may have been assisting in the construction of a bridge which was to be owned by the state of West Virginia does not mean that plaintiff was in West Virginia at the time of his accident. There is no legal authority for such a proposition; in fact, the weight of authority is to the contrary. In *County Court of Wayne County v. Louisa & Fort Gay Bridge Co.*, 46 F.Supp. 1 (S.D.W.Va. 1942), the court addressed the issue of whether a county court (now county commission) could condemn a privately owned toll bridge extending from West Virginia into Kentucky without the permission of the Commonwealth of Kentucky or the owner of such bridge. The court noted that the "boundary line between Kentucky and West Virginia is the middle of Tug Fork of Big Sandy River." *Id.* at 2. Furthermore:

> [N]o state can take or authorize the taking of property located in another state. Each state holds all of the property within its territorial limits free from the eminent domain of all other states. To argue that the people of West Virginia have any inherent right to take property located in Kentucky from a citizen of that state, is to assert that the sovereignty of West Virginia extends to some extent over the soil of Kentucky. To state the proposition is to refute it.

> (Citations omitted) . . . . A state cannot own or acquire property in another state without its consent. *Id.*

Clearly then, there can be no dispute that plaintiff's injury occurred in Kentucky, not West Virginia. The fact that the injury occurred in Pike County, Kentucky is especially important in light of the fact that West Virginia courts apply the *lex loci delicti* choice of law rule when it is arguable that two (2) forums should hear an action. *Mills v. Quality Supplies Trucking, Inc.*, 510 S.E.2d 280 (W.Va. 1998); *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997); See also: *Blais v. Allied Exterminating Co.*, 482 S.E.2d 659 (1996); *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986). Under the doctrine of *lex loci delicti*, the substantive rights between the parties are to be determined by the law of the place of the injury. *Id.* In this case, as plaintiff chose to file his civil action in West Virginia based upon a cause of action that arose in the Commonwealth of Kentucky, this Honorable Court should applied [sic] the substantive law of the Commonwealth of Kentucky.

C. Kentucky Law Mandates the Dismissal of Plaintiffs' Claims.

When Kentucky law is applied, it is clear that the plaintiffs' action against Bush & Burchett and Joe Burchett should be dismissed. Unlike the West Virginia Workers' Compensation system, Kentucky Workers' Compensation is provided through private carriers, albeit structured according to the Kentucky Workers' Compensation Act. Kentucky employees have a choice to make

regarding Workers' Compensation coverage. First, the employee may elect to receive Workers' Compensation benefits as set forth by statute in the Commonwealth of Kentucky and paid for by the private carrier of his or her employer. Second, the employee may opt not to accept benefits, in accordance with the rules and regulations of the Kentucky Workers' Compensation Statute, and pursue an action against the employer. K.R.S. 342.650(6) (1993). The importance of that election is that the employee who elects to receives Workers' Compensation benefits in Kentucky is barred from pursuing an action against his employer, including a "deliberate intention action" by the exclusive remedy provision of the Kentucky Workers' Compensation Statute. That statute, K.R.S. 342.690(1993), provides, in pertinent part:

> (1) If an employer secures payment of compensation as required by this chapter, **the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer** to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. (Emphasis added).

In this case, the evidence is undisputed that plaintiffs have accepted the Kentucky Workers' Compensation benefits. Therefore, that election is their exclusive remedy under Kentucky law, and plaintiffs cannot maintain this action against these defendants. This Honorable Court must apply the law of the Commonwealth of Kentucky and dismiss plaintiffs' claims against these defendants, with prejudice.

D. West Virginia Law Also Mandates the Dismissal of Plaintiffs' Claims.

Even if this Honorable Court should find that West Virginia law applies to plaintiffs' claims against Bush & Burchett and Joe Burchett, as a matter of law a Kentucky employee of a Kentucky employer who is covered under Kentucky Workers' Compensation law cannot maintain a "deliberate intention" cause of action under West Virginia law regardless of whether the injuries occurred in West Virginia or Kentucky.

West Virginia Code § 23-2-1c(c) provides:

> If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter on the count of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on a count of such injury, disease or death.

The West Virginia Supreme Court of Appeals has previously interpreted this statute in cases which are strikingly similar to this case. In *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991), the West Virginia Supreme Court of Appeals was faced with a non-resident employee of a non-resident employer, temporarily employed in West Virginia and who sought to pursue a "deliberate intention" cause of action in West Virginia.

Dismissing the claim, the Supreme Court of Appeals held:

> West Virginia Code § 23-2-1c(c) (1975), makes the compensation law of another state the exclusive remedy against the employer for a non-resident employee who is temporarily employed in this state, if such employee is injured in this state and is covered by his or her employer's workers' compensation in the other state.

Syl. Pt. 3 *Pasquale* 418 S.E.2d at 741.

More recently, in *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996), the Supreme Court of Appeals again faced a non-resident employee of a non-resident employer who sought to avail himself of a "deliberate intention" cause of action against the employer under West Virginia Code § 23-4-2(c)(ii). The Supreme Court held:

> Therefore, a non-resident employee's rights against his employer would be exclusively under the laws of the foreign state, and no remedy would be available against that employer in West Virginia under our deliberate intention statute, West Virginia Code § 23-4-2(c)(ii) (1994).

Syl. Pt. 2, *Gallapoo*, 475 S.E.2d at 173.

The Supreme Court further explained that:

> A non-resident employee who is injured in this state and is protected under the terms and provisions of the workers' compensation laws of a foreign state shall not be entitled to the benefits and privileges provided under the West Virginia Workers' Compensation Act, including the right to file and maintain a deliberate intention cause

of action under West Virginia Code § 23-4-2(c)(ii) (1994). *Id.*, Syl. Pt. 3.

Pasquale involved an Ohio employer, an employee who was an Ohio resident, and the employee was injured in West Virginia. *Gallapoo* involved an Indiana employee of an Indiana employer who was also injured in West Virginia. In the case at bar, the evidence is undisputed that plaintiff was injured in the Commonwealth of Kentucky. However, even if this Honorable Court finds that plaintiff suffered injury in the state of West Virginia, West Virginia Code § 23-2-1c(c), *Pasquale* and *Gallapoo* mandate the dismissal of this claim.

E. Plaintiffs' Claims Against Joe Burchett, Individually, Must Also Be Dismissed.

Each and every argument set forth above applies equally to Joe Burchett, individually, as well as Bush & Burchett. Although it is clear that Kentucky law should apply to plaintiffs' claims against both Bush & Burchett and Joe Burchett, it is also equally clear that Joe Burchett must be dismissed whether this Honorable Court applies Kentucky or West Virginia law.

1. Kentucky Law.

K.R.S. 342.690(1) also provides an exemption from liability to "all employees, officers or directors of such employer" provided that such exemption shall not apply in any case where "the injury or death is proximately caused by the willful and unprovoked physical aggression" of such employee, officer or director.

In this case, plaintiff's injuries clearly did not result from the willful and unprovoked physical aggression of Joe Burchett. As stated above, Mr. Burchett's responsibility for the Goodman Bridge project was only a general responsibility as president of Bush & Burchett. He had no specific responsibility or duties for the Goodman Bridge project after being awarded the bid for the project by the WVDOH. See: Affidavit of Joe Burchett, Exhibit A. Mr. Burchett was not present at the job site on November 1, 1996, the date of plaintiff's accident. *Id.* Moreover, he never directed or instructed plaintiff as to what to do or how to do any particular aspect of his job on the Goodman Bridge project or otherwise. *Id.* He also never instructed Kenny Smith or any other crane operator on the Goodman Bridge project as to what to do or how to do any particular aspect of his job. *Id.* Mr. Burchett did not intend to injure plaintiff, nor was he aware of any other Bush & Burchett employee with any intent to injure Mr. Russell. *Id.*

Plaintiff Fred Russell, Jr., also testified that he did not think anyone at Bush & Burchett intentionally hurt him. See: Depo. Russell Vol. III, p. 87, Exhibit D. Mr. Russell said no one told him to work under the crane's headache ball and he also was not aware of anyone telling the crane operator to hold the headache ball or boom of the crane over his head. *Id.* at pp. 86-87. In fact, plaintiff has produced no evidence whatsoever which could lead any court or jury to believe that anyone connected with Bush & Burchett intentionally hurt plaintiff. Furthermore, Kenny Smith, the operator of the crane involved in the accident, testified that the accident happened because of his own mistake. Depo. Smith at pp. 129-135, Exhibit E.

Mr. Smith denied any intent to injure plaintiff as from his position in the crane he could not see plaintiff's location. *Id.* at pp. 133-134. Clearly, K.R.S. 342.690(1) also bars plaintiffs' claims against Joe Burchett, individually.

2. West Virginia Law.

West Virginia law also mandates the dismissal of plaintiffs' claims against Joe Burchett, individually. Plaintiffs have asserted negligence claims against Mr. Burchett, which are completely unfounded under West Virginia law. West Virginia Code § 23-2-6a extends the employer's immunity from liability set forth in West Virginia Code § 23-2-6 to the employer's officer, manager, agent, representative or employee when such person is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention. See: *Wisman v. William Rhodes & Shamblin Stone, Inc.*, 447 S.E.2d 5 (W.Va. 1994); *Henderson v. Meredith Lumber Co.*, 438 S.E.2d 324 (W.Va. 1993). Therefore, where an employee, officer, or agent of the employer is acting within the course and scope of his employment, the sole remedy for the injured employee is a "deliberate intention" action pursuant to this chapter. *Id.* This section grants to a fellow employee the same immunity the employer would have in relation to the plaintiff's injury. *Spangler v. Fisher*, 159 S.E.2d 903 (W.Va. 1968); *Bennett v. Buckner*, 149 S.E.2d 201 (W.Va. 1966).

Mr. Burchett was at all times acting within the course and scope of his employment and/or duties as president of Bush & Burchett whenever he visited the Goodman Bridge project. Plaintiffs cannot maintain a negligence

cause of action against Mr. Burchett. There is absolutely no evidence that Mr. Burchett was not acting within the course and scope of his employment and/or duties as president of Bush & Burchett. In fact, the undisputed evidence shows that Mr. Burchett was acting within the course and scope of his employment or duties as president of Bush & Burchett, and that he had no intent to injure Mr. Russell. Because the Workers' Compensation Act extends the employer's immunity to Mr. Burchett as an officer of Bush & Burchett, West Virginia Code § 23-2-1c(c), *Pasquale* and *Gallapoo* mandate the dismissal of plaintiffs' claims against Mr. Burchett, individually, as fully discussed above.

F. Even If This Honorable Court Declines to Dismiss All Claims Against These Defendants, Plaintiffs' Claims for Punitive Damages Must Be Dismissed.

Even if this Honorable Court does not completely dismiss plaintiffs' claims against Bush & Burchett and Joe Burchett, individually, this Honorable Court must dismiss plaintiffs' claims for punitive damages against these defendants. West Virginia Code § 23-4-2(c)(iii)(A) specifically states: "no punitive or exemplary damages shall be awarded to the employee or other plaintiff", in cases alleging liability under the provisions of West Virginia Code § 23-4-2(c)(2)(ii). Although punitive damages may be recoverable if the plaintiff or employee proves a cause of action under West Virginia Code § 23-4-2(c)(2)(i), it is clear from the evidence discussed above that no such intent existed herein. For plaintiffs to recover punitive damages against Joe Burchett, plaintiffs would have to

show that Mr. Burchett intentionally injured Mr. Russell under West Virginia Code § 23-4-2(c)(2)(i), or that his actions were outside the scope of his employment or duties as president of Bush & Burchett. As discussed above, there is no evidence to support either contention. West Virginia law mandates the dismissal of plaintiffs' claims for punitive damages against both of these defendants.

IV. CONCLUSION

This Honorable Court is confronted with the following undisputed facts in applying the doctrine of *lex loci delicti*: (1) the plaintiff/employee is a Kentucky resident; (2) the defendant/employer is a Kentucky corporation, with its president also being a Kentucky resident; (3) the accident and injuries complained of occurred in the Commonwealth of Kentucky; and, (4) the plaintiff accepted Kentucky Workers' Compensation benefits, and his claim for West Virginia Workers' Compensation benefits has been found to be not compensable. Clearly, Kentucky law must apply to this action. Kentucky Workers' Compensation law mandates the dismissal of plaintiffs' claims against both Bush & Burchett and Joe Burchett, individually.

Even if this Honorable Court were to hold that West Virginia law applies, West Virginia law also mandates the dismissal of plaintiffs' claims against Bush & Burchett and Joe Burchett, regardless of the location of the injury. Where, as here, a non-resident employee of a non-resident employer is covered by the workers' compensation laws of a foreign state, the non-resident employee may

not maintain his "deliberate intention" cause of action against the non-resident employer under West Virginia law. This result is well-established under West Virginia law and is mandated by West Virginia Code § 23-2-1c(c), *Pasquale* and *Gallapoo*. Although the evidence is clear and undisputed that plaintiff's injury occurred in Kentucky, West Virginia law would mandate the dismissal of plaintiffs' claims even if the injury was found to have occurred in West Virginia.

Furthermore, as an officer of Bush & Burchett who was acting within the course and scope of his employment and/or duties as the president of Bush & Burchett, Joe Burchett is also protected by the immunity afforded to employers under the Workers' Compensation Act in both Kentucky and West Virginia, and plaintiffs' claims against Joe Burchett, individually, must also be dismissed. Finally, with absolutely no evidence suggesting that the injury to plaintiff was intentional, plaintiffs cannot maintain any claims for punitive damages against these defendants.

WHEREFORE, for all of the foregoing reasons, defendants, Bush & Burchett, Inc., and Joe Burchett, individually, by counsel, hereby respectfully request that this Honorable Court grant their Motion for Summary Judgment and dismiss plaintiffs' claims against them, with prejudice, for an award of their attorneys' fees and costs incurred in the defense of this matter, and for such other relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,

BUSH & BURCHETT, INC., AND JOE BURCHETT,

BY COUNSEL,

D. C. Offutt, Jr., Esquire (#2773)
Scott W. Andrews, Esquire(#5772)
Offutt, Fisher & Nord
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868

EXHIBIT A

AFFIDAVIT OF JOE BURCHETT

COMMONWEALTH OF KENTUCKY,

COUNTY OF FLOYD, TO-WIT:

Comes now affiant, Joe Burchett, and, after being first duly sworn, does hereby depose and state as follows:

1, I, Joe Burchett, at all times relevant herein, am the president of Bush & Burchett, Inc.

2. I have a bachelor's degree in civil engineering from the University of Kentucky and also have over thirty-five (35) years experience in the construction industry.

3. Bush & Burchett, Inc., was duly, incorporated in the Commonwealth of Kentucky in 1971 and is duly authorized to conduct business in West Virginia. Bush & Burchett's company offices and principal place of business is located in Allen, Floyd County, Kentucky.

4. Bush & Burchett, Inc., is a contractor which primarily builds bridges. Bush & Burchett, Inc, was the general contractor for what was known as the Goodman

Bridge project for the West Virginia Department of Transportation (hereinafter "WVDOT"), which consisted of building a series of bridges over the Tug Fork of the Big Sandy River linking Pike County, Kentucky, to Mingo County, West Virginia, near Williamson.

5. Bush & Burchett, Inc's, project manager for the Goodman Bridge project was John Ward. The superintendent was Everette Bourland. Mr. Bourland was responsible for Bush & Burchett, Inc's, day-to-day operations on the Goodman Bridge project.

6. I had no specific responsibility or duties for the Goodman Bridge project after being awarded the bid for the project by WVDOT. Prior to receiving the bid, I assisted Bush & Burchett, Inc., personnel in setting the price for the bid to WVDOT.

7. Mr. Bourland and Mr. Ward were in charge of the Goodman Bridge Project and were specifically responsible for Bush & Burchett, Inc.'s, operations and actions on the Goodman Bridge project.

8. My only responsibility for the Goodman Bridge project was a general responsibility as president of Bush & Burchett, Inc.

9. As President of Bush & Burchett Inc., I visited the Goodman Bridge project site approximately once weekly to monitor the project's progress and to determine if there were any problems which required my assistance. On such visits, I would be present at the site for as little as a few minutes or for as much as a few hours, but never for more than one-half (1/2) of the work day.

10. When present at the Goodman Bridge project, I generally spoke with Mr. Bourland and Mr. Ward at the site and do not recall any specific conversations with any other employees other than greetings or exchanges of pleasantries. I never directed or instructed any hourly employees as to what to do or how to do any particular job or task.

11 I never directed or instructed Fred Russell, Jr., as to what to do or how to do any particular aspect of his job on the Goodman Bridge project or otherwise.

12 I never instructed Kenny Smith, or any other crane operator on the Goodman Bridge project, as to what to do or how to do any particular aspect of his job.

13. On each occasion I visited the Goodman Bridge project, I was present solely in my capacity as president of Bush & Burchett, Inc., and was at all times acting within the course and scope of my employment and or duties as president of Bush & Burchett, Inc. I never visited the Goodman Bridge project job site in an individual capacity and never acted in an individual capacity separate and apart from my duties on behalf of Bush & Burchett, Inc.

14 I was not present at the Goodman Bridge project site on November 1, 1996, the date of Mr. Russell's accident which is the subject of this litigation. Therefore, I have no personal, first-hand knowledge of the facts and circumstances giving rise to Mr. Russell's accident. I do not recall the last time I visited the job site prior to Mr. Russell's accident. I am not aware of any written records that would reflect these specific dates when I visited the job site.

15. No one has ever complained to me about fall protection or a lack of fall protection on the Goodman Bridge project when I visited that site or at any other time.

16. I have discussed the importance of providing fall protection to Bush & Burchett, Inc., employees with Mr. Bourland and Mr. Ward.

17. I was not aware of any unsafe work practices at the Goodman Bridge project and I did not observe anything which I believed to be an unsafe work practice at any time when I was present at the Goodman Bridge project job site.

18. I do not recall discussing any unsafe working condition or practice at the Goodman Bridge project with either Mr. Ward or Mr. Bourland at any time.

19. I am not aware of any grievance filed against Bush & Burchett, Inc., over any safety related issues by any union employee or union representative.

20. I never intentionally exposed any Bush & Burchett, Inc., employee to any specific unsafe working condition that I was aware of.

21. Neither myself, nor any other employee of Bush & Burchett, Inc., that I am aware of intended to injure Mr. Russell or any other person at any time.

22. I never had any involvement with inspecting or maintaining any crane owned or leased for operation by Bush & Burchett, Inc., at the Goodman Bridge project.

23. I participated in establishing Bush & Burchett, Inc.'s, safety policies for the work place, including the

Goodman Bridge project, which such policies are intended to comply with OSHA standards and guidelines in addition to industry standards and common sense. However, because Bush & Burchett, Inc., often has several projects ongoing simultaneously, neither I nor any one individual is capable of ensuring that all work places are completely safe. Therefore, the specific responsibility for enforcing safety standards and policies at each job site is delegated to other Bush & Burchett, Inc., management or supervisory personnel at each job site.

24. My participation in policy making regarding safety issues or otherwise is within the course and scope of my employment and/or duties as president of Bush & Burchett, Inc.

25. Bush & Burchett, Inc.'s, company safety officer is John Ward. However, every member of Bush & Burchett, Inc.'s, management team at each job site and each individual employee also has some responsibility for the safety of the work place. Additionally, bridge construction is an inherently dangerous job even in the safest work place.

26. It is Bush & Burchett, Inc.'s, company policy that safety meetings should be held at least weekly at each job site. The meetings should be conducted by a foreman or superintendent. Meetings are generally held first thing Monday mornings, although it is not required that the meetings be held at any specific time.

27. Bush & Burchett, Inc., owns and maintains its own assets, which have never been diverted to non-corporate uses such as for the personal use of myself or any other shareholder.

28. Bush & Burchett, Inc.'s, corporate funds have never been commingled with my personal funds.

29. I am not the sole shareholder of Bush & Burchett, Inc.'s, stock, and ownership of Bush & Burchett, Inc., stock is not limited to one family.

30. Neither I nor Bush & Burchett, Inc., has ever concealed or misrepresented the identity of the ownership, management, or financial interest in the corporation or concealed the personal business activities of the shareholders.

31. Bush & Burchett, Inc.'s, assets have never been diverted from the corporation by or to a stockholder or other person or entity, to the detriment of creditors, nor have Bush & Burchett, Inc.'s assets and liabilities been manipulation [sic] between entities to concentrate assets in one and liabilities in another.

32. Bush & Burchett, Inc., was not formed and has not been used to assume the existing liabilities of another person or entity.

33. Bush & Burchett, Inc., has not contracted with another person or entity with the intent to avoid the risk of nonperformance by the use of the corporate entity, and has not been used as a subterfuge for illegal transactions.

And further the affiant sayeth naught.

/s/ Joe R. Burchett
Joe Burchett

Taken, subscribed and sworn to before me on this 21st day of June, 1999.

My commission expires 06-13-01.

/s/ Vicki H. Ward
Notary Public

EXHIBIT B

AFFIDAVIT

COMMONWEALTH OF KENTUCKY,

COUNTY OF FLOYD, TO-WIT:

Comes now affiant, Vicki H. Ward, and, after being first duly sworn, does hereby depose and state as follows:

1. My name is Vicki Ward and I am Office Manager of Bush & Burchett, Inc. and specifically work at the corporate headquarters in Allen, Kentucky.

2. I currently reside at 1352 Frasure's Creek Road, McDowell Kentucky 41647.

3. As Office Manager at the corporate headquarters of Bush & Burchett, Inc., one aspect of my job duties is the maintenance and custody of corporate records, including state certified payroll reports and foremen's weekly time sheets.

4. The state certified payroll reports are computed from the foremen's weekly time sheets and compiled prior to submission to the State Resident Engineer from the West Virginia Department of Transportation, Division of Highways.

5. On Job 159, the Goodman Bridge project, the State Resident Engineer was Byron Smith.

6. The state certified payroll reports are used to track which side of the project the employee is working for purposes of proper payment of the employee.

7. Carpenters working on the West Virginia side of the Goodman Bridge project received an hourly wage of Twenty Dollars and Thirteen Cents ($20.13) while carpenters working on the Kentucky side of the project received Sixteen Dollars and Thirty-Five Cents ($16.35) per hour.

8. These rates are determined per the pertinent provisions from the United States Department of Labor, the West Virginia Department of Labor, and the Kentucky Department of Labor. See pertinent provisions attached as Exhibit A-2.

9. As custodian of the corporate records I verify that the copies of the state certified payroll reports and Foreman's Weekly Time Sheets for Bush & Burchett, Inc., which are attached to this affidavit as Exhibit A-1, are true and accurate copies of the corporate records.

10. For this affidavit I prepared a summary of the locations and hours worked by Fred Russell, Jr. between the period including May 1, 1996, through November 1, 1996, the date of his injury. See attached as Exhibit A-3.

11 I verify that this summary is a true and accurate summarization of the corporate records regarding the location and hours worked during Fred Russell, Jr.'s employmment for the pertinent period.

12. During this period, Fred Russell, Jr. worked on the Project 159, which is the Goodman Bridge progject, as well as project 156 and 145, which are located entirely in Johnson County, Kentucky and Pike County, Kentucky, respectively.

13. I submitted the form IA-1, entitled "Workers' Compensation – First Report of Injury or Illness" to our Kentucky Workers' Compensation carrier, Kentucky Associated General Contractor's Self-Insurers Fund, for Fred Russell, Jr.

14. Our corporate policy for Workers' Compensation is not based on the state in which the majority of hours are worked by an employee.

15. If a job is totally within one state, then the Workers' Compensation report is sent to that state.

16. With a job which is interstate in nature, then the report is sent to the state in which the injured employee resides. Thus, for Fred Russell, Jr., who is a regularly employed Kentucky employee and, who resides in Salyersville, Kentucky, premiums were paid to Kentucky Associated General Contractor's Self Insurers Fund in order to provide Workers' Compensation coverage for him.

17. This is consistent with our insurance policy with Kentucky Associated General Contractor's Self Insurers' Fund regarding interstate work by our employees who are Kentucky residents. See letter attached as Exhibit A-4.

18. The letter attached as Exhibit A-4 is a true and accurate copy of correspondence between Bush & Burchett, Inc. and our insurer, Kentucky Asociated General Contractor's Self-Insurers' Fund, as received at the corporate headquarters.

FURTHER AFFIANT SAITH NAUGHT.

By: /s/ Vicki H. Ward

Taken, subscribed and sworn to before me this 15th day of October, 1998.

My commission expires December 8, 1999.

/s/ Linda G. Settles
Notary Public

[Exhibit C Omitted In Printing]

EXHIBIT D

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

FRED RUSSELL, JR.,

Plaintiff,

v. Civil Action No. 97-C-2182

BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWOC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP., a New Jersey corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia

Defendants.

VOLUME I

The deposition of **FRED RUSSELL, JR.,** was taken under the West Virginia Rules of Civil Procedure in the above-entitled action before N. Joan Thaxton, a Certified Court Reporter and Notary Public within and for the State of West Virginia, on the 28th day of April 1999, commencing at 11:00

* * *

[29] the beams?

Q Yes, where on the job site.

A That morning we was probably in West Virginia and as we worked through the day, we worked over to where I fell. It was in Kentucky.

Q Prior to this date, had there been any other scaffolding put up on that bridge?

A It had been scaffolding the whole bridge.

Q Were you-all working on an area that did not have any scaffolding yet?

A Right.

Q When you were down on that site, did that portion of the bridge have any specific name that you-all gave it?

A No.

MS. KIRK: Lori, I saw your pictures sticking out there of the bridge.

MS. SIMPSON: With me today?

MS. KIRK: Yes.

MS. SIMPSON: No, I don't have any pictures with me today. I have some medical records.

* * *

[108] MS. SIMPSON: Let me object to the collateral source, but other than that, you can answer.

MS. KIRK: Go ahead.

THE WITNESS: Did I do what now?

BY MS. KIRK:

Q After this accident, you applied for Workers' Compensation and there's records of West Virginia. It's also my understanding that you were given an award from Kentucky. Do you know anything about that?

A No.

Q Do you remember the State of Kentucky sending you some checks or payments?

A They sent me checks, yes.

Q Do you remember them paying for some of your medical bills?

A They paid all the medical bills.

MS. SIMPSON: If I could just interject, the records will show that his employer actually applied for his Workers, Comp in Kentucky and since that time he and Becky have filed for Workers' Comp in West Virginia.

* * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

FRED RUSSELL, JR.,

Plaintiff,

v. Civil Action No. 97-C-2182

BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWOC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP., a New Jersey corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia,

Defendants.

VOLUME III

The deposition of **FRED RUSSELL, JR.**, was taken under the West Virginia Rules of Civil Procedure in the above-entitled action before N. Joan Thaxton, a Certified Court Reporter and Notary Public within and for the State of West Virginia, on the 3rd day of June 1999, commencing at 9:50 a.m.,

* * *

[24] your deposition, Mr. Russell, I believe that you had said that you almost fell on the road that runs below the area of the bridge here that's depicted in Photograph No. 20, which was attached as Exhibit 2. Is that correct?

A Right.

Q Do you know what road that is?

A Let me think for a second.

Do you know what route that was.

MS. SIMPSON: I was thinking it was Route 20, but if you're not sure . . .

THE WITNESS: I'm not sure.

MS. SIMPSON: The map should show what it is.

BY MR. ANDREWS:

Q Do you know if that's Kentucky Route 292?

A That sounds like it.

Q I think you said that the area where you were working at the time of the accident was in Kentucky; is that correct?

A Yes.

Q And the area where you actually fell [25] was in Kentucky; is that correct?

A Yes.

Q You've also marked on this photograph yesterday, I believe, the location of the crane and I think that's indicated by the "C" and the line leading to the "X"; is that correct?

A Yes.

Q Is that location also in Kentucky, sir, to the best of your knowledge?

A Yes.

MR. ANDREWS: I think that's all I have of that photo right now.

BY MR. ANDREWS:

Q I was confused when you were talking about the safety line that would have functioned as a guardrail stretching across the length of the bridge and when you were talking about just the safety rope, which would have been attached to your belt.

Did you say, and correct me if I'm wrong because I'm not clear on this – did you testify previously that you had a safety rope attached to your belt that you could have hooked up

* * *

[45] Q During the time that you worked for Bush & Burchett, did you always live in Kentucky?

A Right.

Q It's my understanding you were always in the Salyersville area. Is that correct?

A I stayed in Man, West Virginia probably a year or so while I worked for them is about all.

Q When was that, if you recall?

A '87, '86.

Q Was your permanent home still in Kentucky though?

A Right.

Q You were just there for a job; is that correct?

A I was there through the week.

Q During the last year that you worked for Bush & Burchett before your accident, were you always living in Kentucky?

A My home was in Kentucky always, yes.

Q You would commute to the job site; is that correct?

A Yes.

* * *

[61] working.

Q Didn't you tell me that when you got hurt you were in Kentucky?

A Well, see, like a couple of hours before that, I was in West Virginia, but come over there to work on the scaffold and I fall in Kentucky, but I had been working in West Virginia the whole time that I had been on that job, pretty well.

Q You live in Kentucky, correct?

A Right.

Q And at the time the accident happened, you were in Kentucky, correct?

A Yes.

Q Do you know what rate you were paid at that time?

A Probably West Virginia's.

Q Do you know that for sure?

A I'm not for sure. I know I started in West Virginia that morning because that's where I parked at.

Q Do you know what your time limitations are for filing Workers' Compensation claims in West

* * *

[65] Q Where did you file for Unemployment benefits, if you recall?

A Prestonsburg.

Q It would have been in Kentucky?

A Yes.

Q Did you file in Kentucky each time that you can recall filing for Unemployment benefits?

A Yes.

Q Do you recall how many times you would have filed for those benefits?

A Over the years?

Q Yes.

A Around once a year.

Q During the whole time you've been working?

A I'm not sure on that.

MR. ANDREWS: Off the record a second.

(WHEREUPON, a discussion was had off the record.)

MR. ANDREWS: While we were off the record, I informed plaintiff's counsel that I have several additional questions regarding the Workers'

* * *

[86] where it wouldn't hit me or anything, until I knowed it was up where it wouldn't bother me.

Q Are you talking about after it had released the load?

A After I unhooked the load?

Q Yes.

A I held the cable as he picked it up out of my reach and out of sight. After that I went back to work.

Q Did you have any idea that you were under the headache ball?

A No.

Q If you knew you were under the headache ball, would you have moved or paid more attention to the crane?

A If I had knowed it was coming, I probably would have jumped to the other side, or tried to. You can't very well walk around and look up and see where everything is when you've just got two foot to walk on, or 20 inches.

Q Do you know if anybody specifically told you to work under the crane?

A No.

[87] Q Do you know if anyone had specifically told the operator to have the headache ball right over you?

A No.

Q You don't think that anyone at Bush & Burchett intentionally wanted you to be hurt, do you?

A No.

Q Do you know Joe Burchett?

A Personally, no.

Q Do you know who he is?

A Yes.

Q Would you see him around the job?

A Yes.

Q What was his role on the Goodman Bridge project, to the extent that you know?

A Just the owner is all I know.

Q The owner of the company?

A Right.

Q Do you know whether he was an officer of the company?

A No.

Q Did he actually have anything to do,

* * *

[Exhibit E Omitted In Printing]

EXHIBIT F

AFFIDAVIT

COMMONWEALTH OF KENTUCKY,

COUNTY OF JEFFERSON, TO-WIT:

Comes now affiant, Alice Howard and, after being first duly sworn, does hereby depose and state as follows:

1. My name is Alice Howard and I am a claims adjuster with Ladegast & Heffner, located in Louisville, Kentucky.

2. Ladegast & Heffner is an insurance adjustment firm which, among other things, administers a Workers' Compensation plan for participating Kentucky employers with coverage through the Kentucky Associated General Contractors Self-Insurers Fund.

3. One such employer is Bush & Burchett, Inc., whose corporate address is P.O. Box 400, Allen, Kentucky 41601.

4. Bush & Burchett, Inc., paid premiums for Workers' Compensation coverage for Fred Russell, Jr., under Policy No. 247 through the Kentucky Associated General Contractors Self-Insurers Fund.

5. On November 6, 1996, Ladegast & Heffner received a "Worker's Compensation – First Report of Injury or Illness" on Form IA-1 with regard to the November 1, 1996 workplace injury to Fred Russell, Jr. See attached Form IA-1 as Exhibit 1.

6. After a telephone interview with Mr. Russell was conducted by Ladegast & Heffner on behalf of the Kentucky Associated General Contractors Self Insurers Fund, Mr. Russell was approved to receive benefits from the Fund on November 18, 1996. Mr. Russell's benefits began to be paid on that date. Mr.

Russell personally completed Form 113 of the Commonwealth of Kentucky's Department of Workers' Claims so as to designate physicians for medical treatment. See attached notification letters and Form 113 to Mr. Russell as Exhibits 2 and 3.

7. To date, Mr. Russell has received the following benefits:

See attached payment registers as Exhibits 4 and 5.

FURTHER AFFIANT SAITH NAUGHT.

LADEGAST & HEFFNER

By: /s/ Alice Howard
Alice Howard

Taken, subscribed and sworn to before me this 19th day of October, 1998.

My commission expires 9-30-2001.

/s/ Dana Beth Ashcroft
Notary Public

[Exhibit G Omitted In Printing]

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FRED RUSSELL, JR.
and REBECCA RUSSELL,

Plaintiffs,

v. CIVIL ACTION NO. 97-C-2182

BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, MANITOWAC CRANES, INC., a Wisconsin corporation, ESSEX CRANE RENTAL CORP. a New York corporation, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' BUSH & BURCHETT AND JOE BURCHETT'S MOTION FOR SUMMARY JUDGMENT

Come now the defendants, Bush & Burchett, Inc. (hereinafter "Bush & Burchett"), and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire, and Offutt, Fisher & Nord, and with their Reply to Plaintiffs' Response in Opposition to Defendants', Bush & Burchett and Joe Burchett's, Motion for Summary Judgment hereby state as follows:

I. INTRODUCTION

Upon closer analysis, Plaintiffs' Response in Opposition to Defendants' Bush & Burchett and Joe Burchett's Motion for Summary Judgment (hereinafter "Plaintiffs' Response"), fails to set forth any factual or legal argument sufficient to oppose the Motion for Summary Judgment of these defendants. The legal authority cited by plaintiffs is clearly distinguishable or inapplicable to this case, and plaintiffs continually attempt to muddy the record in this case by citing to facts arising out of other accidents on other Bush & Burchett work sites which occurred several years ago and which require no response from these defendants other than to state that those facts have no relevance to any of the claims against these defendants in this particular action. Because plaintiffs arguments are without factual or legal support, it is clear that the Motion for Summary Judgment of these defendants previously filed with this Honorable Court must be granted.

II. ARGUMENT

A. West Virginia Law Mandates the Dismissal of Plaintiffs' Claims Against These Defendants.

Plaintiffs cite *Bell v. Vecellio and Grogan, Inc.*, 475 S.E.2d 138 (W.Va. 1996), for the proposition that West Virginia law should permit plaintiff to pursue his deliberate intent cause of action against Bush & Burchett and Joe Burchett in this matter. However, the facts of that particular case are clearly distinguishable from the facts presented herein, and actually are the opposite of the factual situations presented in *Gallapoo v. Wal-Mart Stores, Inc.*,

475 S.E.2d 172 (W.Va. 1996), and *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991), cases on which these defendants rely and which are controlling precedent. In *Bell*, an employee who was injured while on the job in Maryland attempted to file a deliberate intent action against his employer in West Virginia. After the Circuit Court granted the employer's Motion for Summary Judgment the employee appealed. The West Virginia Supreme Court of Appeals reversed the decision of the lower court to permit the employee's deliberate intent action to go forward. However, the employee in *Bell* was a West Virginia resident, employed by a West Virginia employer, with the origin of that employment relationship being in West Virginia. 475 S.E.2d at 140, 145. Those facts are clearly distinguishable from the facts presented herein, in which plaintiff, Fred Russell, Jr., was a Kentucky employee of Bush & Burchett, a Kentucky employer, and was injured in the state of Kentucky. The facts in *Bell* clearly fell within West Virginia Code § 23-2-1a(a)(1), which provides that persons regularly employed in West Virginia whose duties necessitate employment of a temporary or transitory nature by the same employer outside the state are included within the class of employees subject to Chapter 23 of the West Virginia Code, the Workers' Compensation Act.

Conversely, the facts presented in this case clearly fall under West Virginia Code § 23-2-1c(c), which provides that an employee who is a resident of a state other than West Virginia and who is subject to the terms and provisions of the Workers' Compensation law or similar laws of that foreign state shall not be entitled to the

benefits payable under the West Virginia Workers' Compensation Act because of injury, disease or death. Rather, the rights of any such employee are to be determined under the laws of the foreign state, which shall be the exclusive remedy against the employer. The facts of this case are on point with the facts presented in *Gallapoo* and *Pasquale*, and the outcome of this case must be determined pursuant to *Gallapoo* and *Pasquale*. Both *Gallapoo* and *Pasquale* involved out of state residents who were employees of out of state employers, and who were injured in West Virginia. This case involves an out of state resident who was an employee of an out of state corporation, was injured out of state and covered by the Workers' Compensation law of that foreign state, Kentucky. Both *Gallapoo* and *Pasquale* hold that the employee's remedy was under the law of the foreign state, not under West Virginia law. Under the facts of this case, *Gallapoo* and *Pasquale* are clearly controlling precedent; *Bell* clearly has no application to this case. Moreover, *Bell* did not overturn or reverse either the *Pasquale* or *Gallapoo* cases. In fact, the *Gallapoo* case was decided by the Supreme Court of Appeals two (2) days **after** the *Bell* case.

Plaintiffs' argument that Mr. Russell did not apply for Kentucky Workers' Compensation benefits also does not hold water when the evidence is undisputed that Mr. Russell received, accepted, and enjoyed Kentucky Workers' Compensation benefits and that prior to receiving such benefits he participated in a telephone interview with the carrier and completed Kentucky Form 113 in order to designate physicians. See: Affidavit of Alice Howard attached to Memorandum in Support of Motion for Summary Judgment as Exhibit F. As such it is difficult

for plaintiff to argue that he was unaware that he was receiving compensation from Bush & Burchett's Kentucky Workers' Compensation carrier or that he had no opportunity to make a claim for West Virginia benefits.

B. The Contract Between Bush & Burchett and the Division of Highways Does Not Mandate Coverage Under the West Virginia Workers' Compensation Fund.

The plaintiffs argue that the state contract under which Bush & Burchett was awarded the Goodman Bridge project required it to cover all of its employees, regardless of residency or other coverage, under the West Virginia Workers' Compensation Fund. A careful reading of the contract as well as an examination of the parties' intentions as attached in sworn testimony reveals that the contract does not create the obligations advanced by plaintiffs.

The contract at issue is a form contract that is computer generated on all state construction jobs and which contains the following language under Section IV:

> Contractor [Bush & Burchett, Inc.] agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and all other legal requirements not mentioned herein, or specified; to keep all employees on said work protected by the Workers' Compensation Fund **in compliance with the act of the legislature of West Virginia, known as the Workers' Compensation Act,** which is made a part hereof. . . .

Contract, Section IV (emphasis added). (See Exhibit A attached to Plaintiffs' Response.)

The key language which defeats the plaintiffs' argued obligation is the qualifying language "in compliance with the act of the legislature of West Virginia, known as the Workers' Compensation Act." This language does not require that every employee must be protected under the West Virginia Workers' Compensation Fund, but, rather that the employees are protected **in compliance with the Act**. Accordingly, an employer such as Bush & Burchett who regularly employs its Kentucky employees and provides Workers' Compensation coverage for them under the state of their residence, Kentucky, clearly complies with the Act, especially in light of the language of W. Va. Code § 23-2-1c(c) discussed above.

This view is supported by the sworn testimony with regard to the origins of the contract clause and its intended effects by the drafter. Robert K. Tinney, a professional engineer for the WVDOH whose deposition was taken on January 20, 1998, is the WVDOH agent with the most knowledge about the contract. See Exhibit A attached hereto. Specifically, Mr. Tinney testified that the contract did not require all employees to be covered by **West Virginia** Workers' Compensation, only that all employees had Workers' Compensation coverage. Tinney Depo., p. 15, ll. 19-24. Further, Tinney testified as follows regarding the intent of the contract:

> **A. The intent was just for the worker to have proper protection as an employee if he is injured or hurt on the job in accordance with the requirements of the Workers' Compensation Commission, if that is the proper name for it.**

Q. And if the employer provided such coverage and the West Virginia Workers' Compensation Fund denied protection in West Virginia, then the employer would have carried through with your idea of your obligations imposed on them by the contract, correct?

A. Yes, my idea, yes.

Tinney Depo., p. 22, l. 6 through p. 23, l. 9 (bold emphasis added) (Exhibit A).

Likewise, the deposition of Joe Burchett, President of Bush & Burchett, has been taken with regard to the intentions of Bush & Burchett in entering into the contract between the WVDOH and Bush & Burchett. See Exhibit B attached hereto. Mr. Burchett testified:

> We're just providing all of our employees with Workers' Compensation coverage. We don't make the determination of which company or which policy covers which employees. We just make all of our employees covered by Workers' Compensation insurance. Some of the Kentucky residents that are working temporarily out of state have coverage under the Kentucky policy. I think – it is my understanding that West Virginia does not cover temporary employees working in the State of West Virginia if they are covered by another comp carrier.

Burchett Depo., p. 11, l. 24 through p. 12, l. 14. See also Letter from Kentucky Associated General Contractor's Self-Insurers' Fund, attached as Exhibit C hereto. Later, Joe Burchett clarified that Bush & Burchett purchased both West Virginia and Kentucky coverage to comply with the contract, but said it had no input or made no

determination as to who was covered by each policy. Burchett Depo., p. 22, ll. 6-21 (Exhibit B).

As one can see, neither Robert Tinney, as the most knowledgeable witness for the WVDOH, nor Joe Burchett, as President of Bush & Burchett, testified that they intended to obligate Bush & Burchett to cover **each and every employee** under the West Virginia Workers' Compensation Fund. Both parties to the contract indicated that their understanding of the obligations under the clause are to insure that all employees of Bush & Burchett have Workers' Compensation coverage, regardless of location. As this project involved work in two (2) states due to the bridge's design, Bush & Burchett took the most appropriate course of action – procuring Workers' Compensation coverage from carriers in both states so that all employees would have Workers' Compensation coverage regardless of their residency. Plaintiffs have also recognized the validity of this argument, stating: "the W.Va.DOH has no institutional interest in what Fund covers injured Bush & Burchett employees." See: Plaintiffs' Response at p. 9.

C. The Contract Between Bush & Burchett and the Division of Highways Does Not Create a Private Cause of Action Under the West Virginia Workers' Compensation Act.

Plaintiff also argues that he is a third-party beneficiary of the contract between the WVDOH and Bush & Burchett and, therefore is covered pursuant to the West Virginia Workers' Compensation Act. This argument is also without legal support. Plaintiffs' reliance on the

recent case of *Robinson v. Cabell Huntington Hospital, Inc.*, 498 S.E.2d 27 (W.Va. 1997), is misplaced. The *Robinson* Court held, at Syl. Pt. 2:

> In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

The *Robinson* Court also held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's **sole** benefit (emphasis added). *Id.* at p. 32. The *Robinson* Court went so far as to distinguish and modify its earlier decision in *Woodford v. Glenville State College Hous. Corp.*, 225 S.E.2d 671 (W.Va. 1976), a case also cited by plaintiffs. The *Robinson* Court stated that the plain wording of W.Va. Code § 55-8-12, regarding third party beneficiaries to contracts, merits such a restrictive interpretation. *Robinson*, 498 S.E.2d at 32, fn. 5. Claimant was clearly not the **sole** beneficiary of the contract by and between the state of West Virginia and the employer.

Secondarily, the plaintiffs' argument attempts to revive the "contract theory" which was used by many jurisdictions to analyze workers' compensation issues prior to the mid to late 1970's. In *Lester v. State Workmen's Compensation Commissioner*, 245 S.E.2d 443 (1978), the Supreme Court of Appeals rejected the "contract theory,"

holding that rights and duties under the Workers' Compensation Act are not contractual but arise out of the "employer-employee status." *Id.* at pp. 450-51. In light of the rejection of this contract theory for creating rights under the West Virginia Workers' Compensation Act, it is clear that even if the contracting parties had intended such benefits, which they clearly did not, such intent would not be effective under the Act.

The result advanced by plaintiffs would also be contrary to the clear intent of the West Virginia Legislature. No other result can be intended or inferred. The Act is a statutory, administrative scheme. It does not create a contractual relationship, and no contract can create a right to the administrative remedies, rights or benefits under the West Virginia Workers' Compensation Act. Plaintiffs' argument to the contrary is without merit and must be dismissed.

D. Plaintiff Was Not Employed in West Virginia So As to Fall Under the Benefits and Protections of the West Virginia Workers' Compensation Act.

It is undisputed that Fred Russell, Jr. is a Kentucky resident, employed by Bush & Burchett, a Kentucky employer, and who was eligible and received Workers' Compensation from the Kentucky Associated General Contractor's Self-Insurers' Fund. See also Affidavit of Alice Howard, attached as Exhibit F to the defendants' Memorandum in Support of Motion for Summary Judgment. The plaintiffs argue that under the West Virginia

Workers' Compensation Act, however, Mr. Russell is entitled to benefits from the West Virginia Workers' Compensation Division notwithstanding the fact that he is a regularly employed Kentucky employee. West Virginia Code § 23-2-1c(c) (1994) reads, in pertinent part:

> If the employee is a resident of a state other than this state [West Virginia] and is subject to the terms and provisions of the Workers' Compensation law or similar laws of a state other than this state, such employee and his dependant shall not be entitled to the benefits payable under this Chapter on account of injury, disease, or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependants under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease or death.

W. Va. Code § 23-2-1c(c) (1994).

The plaintiffs further support this argument with a section of the West Virginia Code of State Regulations purportedly dealing with extra territorial coverage. Under 85 C.S.R 9, § 6.9(c):

> The Workers' Compensation Division respects the extra territorial right of the Workers' Compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while performing work in the State of West Virginia for a temporary period not to exceed ninety (90) days. . . .

85 C.S.R. 9, § 6.9(c) (1994).

The plaintiffs argue that this regulation specifically defines the term "temporarily" found within the statute, W. Va. Code § 23-2-1c(c). In fact, the statutory language appears to define the "temporary" employee as an employee who meets the statutory requirements of: 1) out of state residency; and 2) being subject to the terms and provisions of another state's Workers' Compensation law. W. Va. Code § 23-2-1c(c) (1994). Accordingly, to the extent that the Code of State Regulation Section is incompatible with the statute's apparent definition of a "temporary" employee, then the statutory language should be construed as superior to that of the regulation. Following that construction, it is clear that Mr. Russell, as a Kentucky resident employee of a Kentucky employer who was eligible for and received Kentucky Workers' Compensation coverage, should be precluded from receiving West Virginia Workers' Compensation benefits under W. Va. Code § 23-2-1c(c).

Notwithstanding that apparently simple resolution of the protest, even if the plaintiffs' argued construction of a ninety (90) day limitation were used to define "temporary," the same result would be reached. The plaintiffs state that Mr. Russell worked in West Virginia for well over the ninety (90) day period which makes him a West Virginia employee. Plaintiffs' Response, p. 8. In support of this proposition, the claimant submits the state certified payroll report from Bush & Burchett regarding Job 159. These documents show the payroll information for the employees on the project, including Fred Russell, Jr. See Exhibit B attached to Memorandum in Support of Motion for Summary Judgment.

Looking at the summary of hours and locations worked by the claimant for Bush & Burchett for the period May 1, 1996 to November 1, 1996, it is clear that from May 5, 1996 to May 29, 1996, Mr. Russell worked on the West Virginia side of the Goodman Bridge project as a carpenter and also as an ironworker. See Exhibit B. From May 30, 1996 to June 3, 1996, Mr. Russell worked on Job 156 for Bush & Burchett which involved the construction of an interchange with two (2) bridges at the junction of U.S. Route 23 and U.S. Route 460 in Johnson County, Kentucky. *Id.* Next, from June 4, 1996 through July 16, 1996, Mr. Russell worked exclusively on the Kentucky side of the Goodman Bridge project except for one (1) shift of work on June 28, 1996. *Id.* After working on the West Virginia side of the project from July 18, 1996 through August 22, 1996, **Mr. Russell then left the Goodman Bridge project and worked from August 22, 1996 through September 28, 1996 at Job 145 for Bush & Burchett, Inc.** *Id.* This project involved the construction of a bridge on a four-lane road near a coal mine in Pike County, Kentucky. From September 30, 1996 to the date of his accident, November 1, 1996, Mr. Russell often split his days between work as a carpenter on the Kentucky side and on the West Virginia side. *Id.* In fact, on the date of his injury, Mr. Russell worked exclusively on the Kentucky side of the bridge. *Id.*

It is clear from this summary of the hours and locations worked by Mr. Russell for the ninety (90) days prior to his injury and, in fact, even for the six (6) months prior to his accident, Mr. Russell had not worked ninety (90)

consecutive working days on this project or in West Virginia. In fact, as is compatible with his status as a regularly employed Kentucky employee, Mr. Russell worked for significant periods of time on jobs wholly within the Commonwealth of Kentucky – Jobs 156 and 145 in Johnson County and Pike County, respectively. Accordingly, even if the plaintiffs' ninety (90) day construction were used, the [sic] Mr. Russell **did not** work in such a way as to establish himself as a regularly-employed "West Virginia employee." Therefore, he is clearly not entitled to West Virginia Workers' Compensation benefits.

Furthermore, plaintiffs' state: "as the plaintiff was on a West Virginia bridge when the force of the impact first took effect upon his body, West Virginia law must apply." See: Plaintiffs' Response at p. 6, fn.1. However, this statement is without legal authority. Mr. Russell himself has testified that he was in Kentucky at the time of the accident, fell in Kentucky, and that the crane was located in Kentucky. The fact that West Virginia owned the bridge does not mean that all of the bridge was located in West Virginia. Mr. Russell was a Kentucky employee and Kentucky law is applicable to this case.

E. Plaintiff's Claim was Compensable in Kentucky, Not West Virginia.

As discussed above, plaintiffs' claims for Workers' Compensation benefits in Kentucky was compensable, and the evidence is undisputed that Mr. Russell accepted and enjoyed Kentucky Workers' Compensation benefits following his unfortunate accident. Each of the checks which Mr. Russell received clearly identified the source of

payment and each are endorsed and cashed by Mr. Russell. Moreover, Mr. Russell participated in a telephone interview with the carrier and filled out Kentucky Form 113 in order to designate physicians prior to receiving such benefits. See: Exhibit F attached to the defendants' Memorandum in Support of Motion for Summary Judgment. In fact, the plaintiffs' claims for Workers' Compensation benefits in West Virginia have consistently been ruled **not** to be compensable in this case. The Workers' Compensation Commissioner, the Workers' Compensation Office of Judges, and the Workers' Compensation Appeal Board have each found that Mr. Russell's claim is **not** compensable. See: Exhibit G attached to the Memorandum in Support of Motion for Summary Judgment. Plaintiffs have appealed these rulings to the Supreme Court of Appeals of West Virginia. However, as of this date, the Petition has not yet been accepted for appeal.

The plaintiffs argue that Bush & Burchett improperly filed Mr. Russell's claim for Workers' Compensation benefits in Kentucky in order to avail itself of Kentucky law, which is more advantageous to the employer. This is pure conjecture. Vicki H. Ward, who is the office manager for Bush & Burchett and the person responsible for filing notices of injury, testified that no such motivation entered the process. See: Exhibit B attached to Memorandum in Support of Motion for Summary Judgment. Ms. Ward testified that once the foremen submitted the information for the notice of injury, the same was sent to the Kentucky Workers' Compensation carrier based on the fact that Mr. Russell was a regularly employed Kentucky employee

who resided in the Commonwealth of Kentucky. *Id.* Furthermore, premiums were paid for him under the Kentucky Workers' Compensation policy and that was the proper designation for the notice to be sent. *Id.*

There is also case law from the Supreme Court of Appeals which addressed a similar claim to that advanced herein. In *Young v. State Compensation Commissioner,* 3 S.E.2d 517 (W. Va. 1939), the court recognized that the impetus and responsibility for asserting a claim lies with the applicant himself. The court then analyzed the reliance on the employer under the principals of agency. The court explained:

> Therefore, when the claimant relied on Allen [employer] to forward his application to the compensation commissioner, it may reasonably be contended that he made Allen [employer] his agent for that purpose, and cannot now rely on his agent's failure to perform the task assigned to him.

Young, 3 S.E.2d at 520. The court went on to hold that:

> The claimant must actively participate to the extent not only of seeing that his application is made out, signed and sworn to, but also filed in the office of the commissioner within the statutory period. *Id.*

In the case at hand, there is absolutely no evidence of employer misconduct. There is evidence, however, that Mr. Russell participated in the telephone interview with Kentucky Associated General Contractor's Self-Insurers' Fund prior to the approval of his claim, that he completed Form 113 for the Kentucky Associated General Contractor's Self-Insurers' Fund, and that he accepted fourteen

(14) months of Workers' Compensation benefits from the employer's Kentucky carrier. See Exhibit F attached to Memorandum in Support of Motion for Summary Judgment.

The evidence is clear that Mr. Russell was aware of the claim being filed in Kentucky and that he received Workers' Compensation benefits from Kentucky. If he disagreed with this action, he could have taken remedial action months earlier. The decision to contest the plaintiff's failure to timely file for West Virginia benefits appears to be a decision made in hindsight because of a possible effect on legal strategy. The fact that plaintiff waited fourteen (14) months to attempt to enforce his legal rights in West Virginia is not a problem created by the employer. Rather, it is a problem created by plaintiff's unjustified failure to contest his Kentucky benefits or to seek his West Virginia benefits for fourteen (14) months following his injury.

F. Plaintiffs' Claims for Punitive Damages Are Without Merit and Must Be Dismissed.

Even if this Honorable Court does not dismiss plaintiffs' claims against these defendants in their entirety, plaintiffs have failed to come forward with any evidence sufficient to create a genuine issue of material fact which would permit them to sustain their claims for punitive damages against these defendants. As discussed in the Memorandum in Support of Motion for Summary Judgment filed by these defendants, pursuant to West Virginia Code § 23-4-2(c)(iii)(A), punitive damages are not recoverable in a deliberate intent cause of action under West

Virginia Code § 23-4-2(c)(2)(ii). In order to recover punitive damages, plaintiffs must prove that the defendants are guilty of deliberate intent under West Virginia Code § 23-4-2(c)(2)(i), which requires a showing of an actual, specific intent and **may not** be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton, or reckless misconduct. West Virginia Code § 23-4-2(c)(2)(i). See also: *Tolliver v. Kroger Co.*, 498 S.E.2d 702 (W.Va. 1997).

There is no genuine issue of material fact that neither of these defendants specifically intended to cause plaintiff's accident or the injuries or damages he allegedly sustained. As fully discussed in the Memorandum in Support of Motion for Summary Judgment, Mr. Burchett did not intend to injure plaintiff, nor was he aware of any other Bush & Burchett employee with any intent to injure Mr. Russell. See: Affidavit of Joe Burchett attached to Memorandum in Support of Motion for Summary Judgment as Exhibit A. Moreover, Mr. Burchett never directed or instructed plaintiff as to what to do or how to do any particular aspect of his job on the Goodman Bridge project or otherwise. *Id.* He also never instructed Kenny Smith or any other crane operator on the Goodman Bridge project as to what to do or how to do any particular aspect of his job. *Id.*

Plaintiff, Fred Russell, Jr., also testified that he did not think anyone at Bush & Burchett intentionally hurt him. See: Deposition of Fred Russell attached as Exhibit D to Memorandum in Support of Motion for Summary Judgment. Mr. Russell said no one told him to work

under the crane's headache ball and he was not aware of anyone telling the crane operator, Kenny Smith, to hold the headache ball or boom of the crane over his head. *Id.* In fact, plaintiff has produced no evidence whatsoever which could lead any court or jury to believe that anyone connected with Bush & Burchett intentionally hurt plaintiff. Furthermore, Kenny Smith, the crane operator, testified that the accident happened because of his own mistake. See: deposition of Kenny Smith attached as Exhibit E to Memorandum in Support of Motion for Summary Judgment. Mr. Smith denied any intent to injure plaintiff, and stated from his position in the crane he could not see plaintiff's location. *Id.* Clearly, there are no genuine issues of material fact which would prevent the dismissal of plaintiffs' claims for punitive damages against these defendants.

Plaintiffs have attempted to sway the judgment of this Honorable Court by citing facts allegedly arising out of other work place accidents which have been sustained at other Bush & Burchett work sites, including a criminal indictment arising out of a prior work place accident. These facts simply have no relevance to this accident. Not only are these facts not relevant to this case under West Virginia Rules of Evidence Rules 401 and 402, even if minutely relevant, such evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury against Bush & Burchett and/or Joe Burchett. W.V.R.E. Rule 403. It is improper for plaintiffs to attempt to sustain a claim for punitive damages in this case by attempting to offer inadmissible evidence from other alleged incidents at Bush & Burchett's work sites

which are not at issue herein. Plaintiffs have not even offered a scintilla of relevant evidence which would sustain their claims for punitive damages against Bush & Burchett or Joe Burchett in this matter, even assuming *arguendo* plaintiffs' claims are not dismissed in their entirety. Therefore, even if plaintiffs' claims against these defendants are not dismissed in their entirety, there can be no doubt that plaintiffs' claims for punitive damages must be dismissed.

G. Plaintiffs' Claims Against Joe Burchett Individually Must Be Dismissed.

Plaintiffs' claims of piercing the corporate veil to get to Joe Burchett have no relevance to this case. As long as Mr. Burchett was acting within the course and scope of his employment or job duties as president of Bush & Burchett, he enjoys the same immunity from suit by an employee as does the plaintiffs' employer, Bush & Burchett. See: K.R.S. 342.690(1); West Virginia Code § 23-2-6a. Plaintiffs have failed to come forward with any evidence that Mr. Burchett was acting outside the course and scope of his employment or job duties as president of Bush & Burchett.

Moreover, Mr. Burchett does not rely solely on *Wisman v. William Rhodes and Shamblin Stone, Inc..*, 447 S.E.2d 5 (W.Va. 1994), and *Henderson v. Merideth Lumber Co.*, 438 S.E.2d 324 (W.Va. 1993) in order to avoid liability in this matter. Mr. Burchett also relies on all of the remaining case law and statutory citations set forth in the Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment of Bush &

Burchett and Joe Burchett. Plaintiffs have failed to offer any argument supported by relevant facts or applicable law which would prevent the dismissal of their claims against Mr. Burchett. They have relied on alleged facts which are not relevant or which are inadmissible in this case, and rely on misplaced or inapplicable legal theory. Whether pursuant to Kentucky law or West Virginia law, plaintiffs' claims against Joe Burchett individually and against Bush & Burchett must be dismissed, with prejudice. There are no genuine issues of material fact presented which prevent the relief sought by these defendants.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons and for the reasons set forth in the defendants' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment previously filed with this Honorable Court, defendants, Bush & Burchett, Inc., and Joe Burchett, by counsel, hereby respectfully request that this Honorable Court grant their Motion for Summary and dismiss plaintiffs' claims against them, with prejudice, for an award of their attorneys' fees and costs incurred in the defense of this matter, and for such other relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,

BUSH & BURCHETT, INC., AND JOE BURCHETT,

BY COUNSEL,

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

FRED RUSSELL, JR.
and REBECCA RUSSELL,

Plaintiffs / Appellants,

v. APPEAL NO. 28398

BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia,

Defendants / Appellees.

APPEAL FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF APPELLANTS FRED RUSSELL, JR. AND REBECCA RUSSELL

Submitted by:

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TABLE OF CONTENTS

Table of Authorities 3

Kind of Proceeding and Nature of Ruling Below ... 5

Statement of Facts 5

Assignments of Error 9

I. PETITIONER FRED RUSSELL, JR. IS COVERED BY THE WEST VIRGINIA WORKERS' COMPENSATION ACT BECAUSE HE WAS A NON-TEMPORARY EMPLOYEE WHO HAD BEEN HIRED TO WORK SPECIFICALLY IN WEST VIRGINIA AND THE CONTRACT COVERING HIS WORK PROVIDED HE WAS TO BE PROTECTED BY THE WEST VIRGINIA WORKERS' COMPENSATION FUND, AND AS SUCH, PETITIONER SHOULD BE PERMITTED TO MAINTAIN A DELIBERATE INTENTION ACTION AGAINST HIS EMPLOYER UNDER WEST VIRGINIA LAW 11

II. THE CIRCUIT COURT ERRED IN APPLYING KENTUCKY LAW BECAUSE KENTUCKY LAW IS REPUGNANT TO THE PUBLIC POLICY OF WEST VIRGINIA..... 19

Conclusion and Prayer for Relief 20

TABLE OF AUTHORITIES

CASES

Adkins v. St. Francis Hospital, 149 W.Va. 705, 143 S.E.2d 154 (1965) 20

Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 475 S.E.2d 138, Syl. Pt. 3 (1996)..... 9, 11, 12

Bradley v. Appalachian Power Co., 163 W.Va. 332, 256 S.E.2d 879 (1979) 20

Coffindaffer v. Coffindaffer, 161 W.Va. 557, 244 S.E.2d 338 (1978) 20

Daily Gazette Co., Inc. v. West Virginia Dev. Office, 206 W.Va. 51, 521 S.E.2d 543 (1999) 13

Dallas v. Whitney, 118 W.Va. 196, 188 S.E. 766 (1936) 20

Gallapoo v. Wal-Mart Stores, Inc., 192 W.Va. 172, 475 S.E.2d 172 (1996) 10, 17, 18

Higginbotham v. City of Charleston, 157 W.Va. 724, 204 S.E.2d 1 (1974) 20

In the matter of: Carvel Howard (deceased), Judy K. Howard (widow) and Workers Compensation Division and Bush & Burchett, Inc.: Claim No. 97-02593 16

Lee v. Comer, 159 W.Va. 585, 224 S.E.2d 721 (1976) 20

Pasquale v. Ohio Power Co., 187 W.Va. 292, 418 S.E.2d 738 (1992) 10, 17, 18

Paul v. National Life, 177 W.Va. 427, 352 S.E.2d 550, 556 (1987) 10, 20

Russell v. Workers' Compensation Commissioner and Bush & Burchett, Inc., Appeal No. 992329 17

State of West Virginia v. Gen. Daniel Morgan, Post No. 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353, Syl. Pt. 5 (1959) 13

State v. Epperley, 135 W.Va. 887, 65 S.E.2d 488, Syl. Pt. 2 (1951) 13

State v. Jarvis, 199 W.Va. 635, 487 S.E.2d 293, Syl. Pt. 1 (1997) 13

VanKirk v. Young, 180 W.Va. 18, 375 S.E.2d 196, Syl. Pt. 1 (1988) 13

UNITED STATES CODE

Occupational Safety and Health Act 29 U.S.C. § 661, *et seq* 6

WEST VIRGINIA STATUTES AND REGULATIONS

West Virginia Code § 23-2-1, *et seq.* 9
West Virginia Code § 23-2-1a 13
West Virginia Code § 23-2-1c(c) 13
West Virginia Code § 23-4-2(c)(2) ... 8, 9, 11, 12, 16, 19
89 C.S.R. 9 § 6.9.c 10, 13, 14

KENTUCKY STATUTE

Kentucky Revised Statute 342.650(6) (1993) 16, 19

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from an Order entered by the Circuit Court of Kanawha County granting appellees Bush & Burchett and Joe Burchett's (hereinafter also referred to as "appellees") Motion for Summary Judgment and dismissing plaintiffs/appellants' claims with prejudice. Appellants filed the instant personal injury action against the appellees based upon theories of deliberate intention and negligence. The Court's Order granting the Motion for Summary Judgment is a final and appealable order as it dismisses in its entirety a cause of action as to the appellees herein.

STATEMENT OF FACTS

On November 1, 1996, appellant Fred Russell, Jr. was working for the State of West Virginia as an employee of Bush & Burchett, Inc. and Joe Burchett erecting scaffolding in the construction and erection of a bridge to span the Tug Fork River from Williamson, West Virginia to

South Williamson, Kentucky. While he was working on the bridge, the cable of a Manitowoc crane (the boom and jib of which were being operated above the appellant) released, causing the suspended 800 pound headache ball to fall and hit appellant's head and shoulder. As a result, appellant was knocked off the scaffolding and fell approximately thirty feet onto the land and rocks below. Appellant suffered a seventy percent (70%) compromise of the spinal canal resulting in total laminectomy; facetectomy; L-2 level internal fixation with seven (7) hooks, two (2) screws, two (2) rods, and two (2) cross links from T-10 to L-4 with bone grafts; a broken right arm; permanent scarring on his arm and back; injuries to his shoulder; headaches; and numerous other injuries. Unfortunately, it is only a matter of time before Mr. Russell will be unable to walk completely. At present, Mr. Russell can no longer work to support his wife and son as he had done for years, and must spend his days in a dark world of pain and depression.

Appellees Bush & Burchett, Inc. and Joe Burchett have contracted with and worked in the State of West Virginia on several prior occasions. *See* Record, Tinney Deposition at 22-23. These appellees also have been haled into West Virginia Courts and Federal District Court on several prior occasions for causing serious injuries to and even the deaths of their workers.[1] *See* Record, Affidavit of

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[1] Indeed, Bush & Burchett has been cited on numerous occasions by the Occupational Safety and Health Administration (hereinafter "OSHA") for failure to provide fall protection, failure to provide adequate safety training, failure to identify existing and predictable hazards on the job site, failure to perform complete inspections of cranes, failure to establish a

Matthew Burkhart. In fact, federal criminal charges were filed against Bush & Burchett and Joe Burchett as a result of the deaths of two of their employees in Lincoln County, West Virginia in the fall of 1991 in another crane accident in which Bush & Burchett and Joe Burchett were charged with willful violations of the Occupational Safety and Health Act, 29 U.S.C. § 661, *et seq.*, when they overloaded two cranes which collapsed upon and killed the workers. *Id.* These appellees also recently defended wrongful death action brought in Mingo County, West Virginia for the death of one of Bush & Burchett's employees, Carvel Howard, in April of 1996, when Mr. Howard was crushed to death by an excavator in an area which had not been properly barricaded in accordance with OSHA rules and regulations. *Id.*

While appellant was hospitalized and under heavy medication post surgery, his employer, appellees Bush & Burchett and Joe Burchett, signed him up for Kentucky workers' compensation. Neither Mr. Russell nor his wife Rebecca had any knowledge that the appellees had submitted a claim on his behalf to Kentucky rather than West Virginia. Indeed, both believed that they were eligible for West Virginia workers' compensation.

On the date of his injury, November 1, 1996, appellant Fred Russell, Jr. was working on a West Virginia

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preventative maintenance program based on the crane manufacturer's recommendations, failure to observe the crane manufacturer's rated load capacity for its crane, and numerous other violations of the Occupational Safety and Health act, 29 U.S.C. § 661, *et seq. See* Record, Affidavit of Matthew Burkburt at para. 9.

bridge being built by and for West Virginia on a West Virginia project. Mr. Russell, a former West Virginia resident, had worked for Bush & Burchett in West Virginia for approximately the last three and one-half (3½) years before his injury. He had been working at the site where his injury occurred since the summer of 1995. *See* Record, Affidavit of Fred Russell, Jr. at 8. During the great majority of the time that he worked on this project, Mr. Russell worked on the West Virginia side of the bridge. *Id.* Immediately before being transferred to this bridge project, Mr. Russell worked for Bush & Burchett in Justice, West Virginia for approximately twelve (12) continuous months. *See* Record, Affidavit of Fred Russell, Jr. at 11. For at least one (1) year immediately prior to the Justice, West Virginia project, Mr. Russell worked in Logan County, West Virginia for Bush & Burchett. *Id.* at 11.

Some time prior to appellant's accident, the West Virginia Department of Transportation, Division of Highways (hereinafter "W.VA. DOH") advertised in the State of West Virginia and invited proposals for the construction and erection of this and other bridges. On May 1, 1995, appellee Bush & Burchett, Inc. entered into a contract with W.VA. DOH for the performance of said construction projects. *See* Record, Contract. As part of that contract, appellee Bush & Burchett, Inc., agreed to conform to the laws of the State of West Virginia, and to keep all employees engaged on said worked protected by the Workers' Compensation Fund in compliance with the Workers' Compensation Act, which Act was made a part of the contract. *Id.* Specifically, the contract between Bush & Burchett and the State of West Virginia provided, in pertinent part:

> (4) Contractor [Bush & Burchett, Inc.] agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and to all other legal requirements not mentioned herein or specified; ***to keep all employees engaged on said work protected by the Workers' Compensation Fund in compliance with the act of legislature of West Virginia, known as the Workers' Compensation Act, which is made apart hereof. . . .***

See Record, Contract (emphasis added). At no time did the W.VA. DOH or Bush & Burchett modify the terms of this contract concerning Workers' Compensation coverage.

Appellants Fred and Rebecca Russell brought this action against appellees Bush & Burchett, Inc., and Joe Burchett based on the deliberate intention statute, West Virginia Code Section 23-4-2(c)(2)(i) and (ii), and negligence. Appellants allege and will be able to prove at trial that at the time of Mr. Russell's accident, several specific unsafe working conditions existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death. These conditions included, but are not necessarily limited to a failure to provide adequate fall protection, failure to properly maintain and inspect the crane, failure to properly train and qualify the crane operator, failure to provide adequate safety training, and a failure to provide an operator's manual with the crane. Bush & Burchett's knowledge and appreciation of these unsafe working conditions is demonstrated by their prior citations by OSHA and experience in the industry. Notwithstanding their knowledge and appreciation of the existence of

these unsafe working conditions, Bush & Burchett nevertheless exposed Fred Russell, Jr. to them and he was severely and permanently injured as a result.

ASSIGNMENTS OF ERROR

The Circuit Court erred in applying Kentucky law under the doctrine of *lex loci deliciti* [sic] and thereby granting the Motion for Summary Judgment of appellees Bush & Burchett and Joe Burchett. Appellant Fred Russell, Jr. was a non-temporary employee hired to work specifically in West Virginia for the State of West Virginia, and was "covered by" the West Virginia Workers' Compensation Act, West Virginia Code Section 23-2-1, *et seq.* Mr. Russell was also "covered by" the Act through the contract between the W.VA. DOH and Bush & Burchett. Furthermore, the interests of justice compel the Court to find that appellant Fred Russell, Jr. was "covered by" the Act as his sophisticated employer has unclean hands in signing up Mr. Russell for Kentucky compensation while Mr. Russell was hospitalized, all in an obvious attempt to insulate the employer from liability. As such, appellant Fred Russell, Jr. was entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action against his employer pursuant to West Virginia Code Section 23-4-2(c)(2)(i)-(ii) (1991). *See Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138, Syl. Pt. 3 (1996) (holding that all employees "covered by" the West Virginia Workers' Compensation Act are entitled to all benefits and privileges under the Act, including the right to file a deliberate intention cause of action). Contrary to the dictate of *Bell*, the Circuit Court erroneously applied the *lex loci delicti*

doctrine in reaching its conclusion that Kentucky law applied, and consequently erroneously dismissed appellants' action. *See id.*

Further, the Circuit Court erred in its conclusion that the application of West Virginia law would result in dismissal of appellants' claims against appellees. As appellant Fred Russell, Jr. was hired to work specifically in West Virginia, and pursuant to 85 C.S.R. 9 Section 6.9.c., he "must" have been protected under the West Virginia Workers' Compensation Fund. In addition, under the terms of the contract between the State of West Virginia and the appellees, appellant Fred Russell, Jr. was covered by the West Virginia Workers' Compensation Act. As Mr. Russell was a non-temporary employee hired to work specifically in this state and was protected by the West Virginia Workers [sic] Compensation Act pursuant to contract, the Circuit Court erred in relying upon the decisions of this Court in *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1992) and *Gallapoo v. Wal-Mart Stores. Inc.*, 192 W.Va. 172, 475 S.E.2d 172 (1996) to conclude that application of West Virginia law would result in dismissal of appellants' claims as well.

Finally the Circuit Court erred in applying Kentucky law as it is repugnant to the strong public policy of the State of West Virginia to compensate persons injured as a result of the negligence of others. *See Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550, 556 (1987) (holding it is "the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort."). Appellants urge this Court to find that West Virginia law does, indeed, apply and that appellants may

maintain their deliberate intention action against the appellees.

I.

APPELLANT FRED RUSSELL, JR. IS COVERED BY THE WEST VIRGINIA WORKERS' COMPENSATION ACT BECAUSE HE WAS A NON-TEMPORARY EMPLOYEE WHO HAD BEEN HIRED TO WORK SPECIFICALLY IN WEST VIRGINIA AND THE CONTRACT COVERING HIS WORK PROVIDED HE WAS TO BE PROTECTED BY THE WEST VIRGINIA WORKERS' COMPENSATION FUND, AND AS SUCH, APPELLANT SHOULD BE PERMITTED TO MAINTAIN A DELIBERATE INTENTION ACTION AGAINST HIS EMPLOYER UNDER WEST VIRGINIA LAW

In *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996), an ironworker from West Virginia was employed by the defendant highway construction company. *Id.* The ironworker was assigned to a bridge construction site in Maryland when he received a crushing injury from steel beams that were dropped from a crane. *Id.* Even though his injury occurred within the boundaries of Maryland, the injured ironworker applied for and received benefits from West Virginia Workers' Compensation and thereafter attempted to bring a lawsuit against his employer under the deliberate intention statute, West Virginia Code Section 23-4-2(c)(2)(ii).[2] *Id.* The employer

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[2] The "deliberate intention" statute provides, in pertinent part:

> (2) The immunity from suit provided under this section . . . may be lost only if the employer or person

asserted that the ironworker was not entitled to bring a deliberate intention lawsuit because the injury occurred

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against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

* * *

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

in Maryland, not West Virginia. Thus, the employer argued, under the doctrine of *lex loci delicti*, the law of Maryland should apply. If the laws of Maryland applied, the employer argued, the ironworker could not maintain an action against the employer. *Id.* The trial Court agreed with the employer, applied Maryland law, and dismissed the case. *Id.* However, this Court upon *de novo* review, reversed the lower court's decision and allowed the ironworker to maintain an action under West Virginia law. The Court stated:

> West Virginia Code 23-4-2(c)(i)-(ii) (1991) has blended within the West Virginia Workers' Compensation scheme the directive that ***all employees covered by the West Virginia Workers' Compensation Act*** are subject to every provision of the Workers' Compensation chapter and ***are entitled to all benefits and privileges under the Workers' Compensation Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to West Virginia Code 23-4-2(c)(2)(i)-(ii) (1991).***

Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 475 S.E.2d 138, Syl. Pt. 3 (1996) (emphasis added). Thus, as long as an employee is "covered by" the West Virginia Workers' Compensation Act, the employee may bring a deliberate intention cause of action against his employer.

On the date of his injury, Fred Russell, Jr. was a resident of Salyersville, Kentucky. Injured employees

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> (E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W.Va. Code § 23-4-2(c)(2)(ii) (1994).

from other states may be covered by the West Virginia Workers' Compensation Act.[3] The circumstances under which this may occur are set forth in West Virginia Code Section 23-2-1c(c), which states:

> If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter on account of injury, disease or death in the course of and as a result of employment *temporarily* within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy

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[3] Mr. Russell certainly was eligible for the privileges and benefits of the West Virginia Workers' Compensation Act, under West Virginia Code Section 23-2-1a, which provides in pertinent part:

> (a) Employees subject to this chapter are all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged, ***including, but not limited to:***
>
> (1) ***Persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state;***
>
> (2) ***Every person in the service of the state or of any political subdivision or agency thereof, under any contract of hire, express or implied, and every appointed official or officer thereof while performing his or her official duties. . . .***

W.Va. Code § 23-2-1a (1991) (emphasis added).

> against the employer on account of such injury, disease or death.

W.Va. Code § 23-2-1c(c) (emphasis added). Therefore, the application of another state's workers' compensation law is allowed when the nonresident employee is working in West Virginia on a "temporary" basis. What constitutes "temporary" employment is not defined in the statute. However, a definition is found within the regulations governing the decisions made by the West Virginia Workers' Compensation Fund. This regulation unambiguously[4] states:

> The workers' compensation division respects the extraterritorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contract of hire have [sic] been consummated in some state other than West Virginia, while performing work in the state of West Virginia for a ***temporary period not to exceed ninety (90) days***. Employees whose contracts of hire are consummated at a job site in West Virginia ***or employees who have been hired to work specifically in West Virginia must be protected*** for workers'

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[4] When a statute is clear and unambiguous, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. *State of West Virginia v. Gen. Daniel Morgan, Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 , Syl. Pt. 5 (1959); *VanKirk v. Young*, 180 W.Va. 18, 375 S.E.2d 196, Syl. Pt. 1 (1988); *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999); *State v. Epperley*, 135 W.Va. 887, 65 S.E.2d 488, Syl. Pt. 2 (1951); *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293, Syl. Pt. 1 (1997).

> compensation insurance ***under the West Virginia Workers' Compensation Fund.***

85 C.S.R. 9 § 6.9.c (emphasis added).

Reviewing the facts of this case and the coverage rules of this regulation, Fred Russell, Jr., is covered by the West Virginia Workers' Compensation Act, and consequently, should be entitled to maintain a deliberate intention action against his employer.

Mr. Russell had worked for Bush & Burchett in West Virginia for approximately the last three and one-half (3 1/2) years before his injury. He had been working at the site where his injury occurred since the summer of 1995. *See* Record, Affidavit of Fred Russell, Jr. at 8. During the great majority of the time that he worked on this bridge project, Mr. Russell worked on the West Virginia side of the bridge. *Id.* Immediately before being transferred to this bridge project, Mr. Russell worked for Bush & Burchett in Justice, West Virginia for approximately twelve (12) continuous months. *See* Record, Affidavit of Fred Russell, Jr. at 11. For at least one (1) year immediately prior to the Justice, West Virginia project, Mr. Russell worked in Logan County, West Virginia for Bush & Burchett. *Id.* at 11. As a West Virginia employee, Mr. Russell received West Virginia Workers' Compensation benefits for a previous injury. *Id.* at 9.

The regulation at 85 C.S.R. 9 Section 6.9.c makes it clear that employees who work in West Virginia more than 90 days and ***employees who have been hired to work specifically in West Virginia*** "must be protected" under the West Virginia Workers' Compensation Fund. Thus,

appellant was covered by the Act and should be permitted to maintain his deliberate intention action against the appellees.

Additionally, by contract, Bush & Burchett agreed to keep Mr. Russell covered by West Virginia Workers' Compensation. Specifically, the contract between Bush & Burchett and the State of West Virginia provided, in pertinent part:

> (4) Contractor [Bush & Burchett, Inc.] agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and to all other legal requirements not mentioned herein or specified; ***to keep all employees engaged on said work protected by the Workers' Compensation Fund in compliance with the act of legislature of West Virginia, known as the Workers' Compensation Act, which is made a part hereof.*** . . .

See Record, Contract (emphasis added). At no time did the W.VA. DOH or Bush & Burchett modify the terms of this contract concerning Workers' Compensation coverage. To the contrary, both W.VA. DOH and Bush & Burchett intended for West Virginia Workers' Compensation to apply, and the actions taken by Bush & Burchett were simply to avoid the protections provided under West Virginia law to the appellants under a contract freely executed by Bush & Burchett, Inc. and the State of West Virginia. Had Bush & Burchett and the State of West Virginia wished to insure these employees under Kentucky Workers' Compensation, the contract should have so reflected and the employees should have been given adequate notice of the same as it certainly affected their

substantive rights. Obviously, Bush & Burchett preferred to cover its employees under Kentucky compensation law.[5]

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[5] This contention is amply demonstrated by the fact that Bush & Burchett consistently applied to the Kentucky Workers' Compensation Fund when its employees were injured even when the accidents occurred in West Virginia. Not only did the appellees wrongfully file Mr. Russell's claim in Kentucky, it also made the same "mistake" with its employee Carvel Howard.

Despite Mr. Russell's work history in and for the State of West Virginia, his expectations, the fact that the injury occurred on a West Virginia bridge while working under a West Virginia State contract, and the fact that Bush & Burchett had contractually agreed that its workers on the project would be protected by West Virginia Workers' Compensation, Bush & Burchett immediately and inexplicably filed a Workers' Compensation claim on Mr. Russell's behalf in the state of Kentucky while Mr. Russell was hospitalized and medicated. Neither Mr. Russell nor his wife Rebecca authorized such application to be made in Kentucky on Mr. Russell's behalf.

The reason why Bush & Burchett filed Mr. Russell's claim in Kentucky is obvious. Under Kentucky law, in order to receive further compensation, Mr. Russell would have to forego any civil action against his employer. The laws of Kentucky force employees to make an "election." Under those laws, employees must choose either to receive workers' compensation benefits or to pursue a lawsuit against their employer in the event they are injured. *See* Kentucky Revised Statute 342.650(6) (1993). However, in West Virginia, the legislature has provided for a worker to receive workers' compensation benefits *and* to bring a lawsuit against his employer if the stringent requirements of the deliberate intention statute, West Virginia Code Section 23-4-2(c)(2), have been met. Hence, Bush & Burchett's motivation and reason for improperly filing Mr. Russell's claim in Kentucky was an attempt to preempt Mr. Russell from filing a direct action against it pursuant to the deliberate intention exception to the Workers' Compensation immunity provided

Interestingly, the West Virginia Workers' Compensation Division has had an opportunity to adjudicate the meaning of the same contractual provision at issue here in the Workers' Compensation appeal styled *In the matter of: Carvel Howard (deceased), Judy K. Howard (widow) and Workers' Compensation Division and Bush & Burchett, Inc.*: Claim No. 97-02593. *See* Record, ALJs decision regarding Carvel Howard's appeal. In *Howard*, the deceased Claimant was working for Bush & Burchett, Inc. on a similar bridge project with Mr. Russell. *Id.* at 3. While Mr. Howard was working, he "received a massive trauma injury to the pelvis/groin area on April 25, 1996, when Mr. Howard was struck-by a backhoe." *Id.* at 2. He died later that day. *Id.*

As in this case, Bush & Burchett filed a claim on behalf of its employee in Kentucky. Mr. Howard's widow applied for workers' compensation benefits in West Virginia. The Division originally denied the benefit request, but such denial was overturned by Administrative Law Judge Marcella Gower Townsend. *Id.* at 4.

Judge Townsend ruled that Mr. Howard was an employee within the meaning of the West Virginia Workers' Compensation Act at the time he was killed. *Id.* at 3-4. Important to the ALJ in reaching her decision was the contractual provision which is also relied upon by the appellants here. *Id.* at 3. As Judge Townsend noted, this

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for in the West Virginia Workers' Compensation statutory scheme. Quite clearly, if he is permitted to present this case to a jury, Mr. Russell will be able to prove he was knowingly and intentionally exposed to a specific unsafe working condition by his employer and was severely injured as a result.

contractual provision means that ***"under the terms of the contract, the Claimant was covered by the West Virginia Workers' Compensation Act."*** *Id.* (emphasis added). Similarly, Mr. Russell was also covered by the Act by virtue of the contract between Bush & Burchett and the W.VA. DOH.[6]

Furthermore, in neither of the cases relied upon by the circuit court in its decision, *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1991) nor *Gallapoo v. Wal-Mart Stores, Inc.*, 192 W.Va. 172, 475 S.E.2d 172 (1996) was there a contract which explicitly stated that the West Virginia Workers' Compensation Act applied to all employees working on those projects. In *Gallapoo* and *Pasquale*, the Court held that the workers' compensation scheme of another state is the exclusive remedy against the employer for a non-resident employee who is temporarily employed in West Virginia, if such an employee is injured while working in West Virginia and is covered by the

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[6] Mr. Russell attempted to file for and receive West Virginia Workers' Compensation benefits. However, because the six month statute of limitations for filing this claim was missed, he was denied benefits. *See* Petition for Appeal and Record, *Russell v. Workers' Compensation Commissioner and Bush & Burchett, Inc.*, No. 992329. This Court's Order entered May 31, 2000 refused Mr. Russell's Petition for Appeal of the decision of the Commission. However, there has never been any intimation by the Workers' Compensation Commissioner or the Office of Judges that Mr. Russell would not have been "covered by" West Virginia Workers' Compensation pursuant to the Contract between the State of West Virginia and Bush & Burchett if he had timely filed his claim. To the contrary, it is clear that the *Carvel Howard* decision should be controlling regarding the interpretation of the Contract.

workers' compensation act of the other state. Mr. Russell's case is easily distinguishable from both of these cases.

First, in *Gallapoo*, the injured "temporary" employee actually applied for workers' compensation benefits from the State of Indiana before attempting to file a "deliberate intention" action in West Virginia. In that case, Indiana's workers' compensation law applied since the employee himself chose Indiana workers' compensation law; and he was classified as a "temporary" employee. In this case, Bush & Burchett, not the Russell's, filed the Kentucky claim, and Mr. Russell was a non-temporary employee. Additionally, in *Gallapoo*, there was not a contract between the contractor and Wal-Mart wherein the contractor agreed that West Virginia workers' compensation benefits would be provided. The parties in this case agreed by written contract that West Virginia law would apply. Further, the employee in *Gallapoo* could have applied for and received Indiana workers' compensation benefits *and* filed an intentional tort claim against his employer in Indiana; whereas, Mr. Russell would have been forced to make an "election" under Kentucky law. Thus, *Gallapoo* is clearly distinguishable from the Russells' case.

Additionally, in *Pasquale*, the injured employee had been working in West Virginia for a temporary period. Again, the plaintiff in that case chose to seek the benefits of the foreign state, whereas in the case at bar, Bush & Burchett submitted the claim on behalf of the Russell's without their knowledge and while Mr. Russell was mentally and physically incapacitated. Also, in *Pasquale*, there was no contract between the independent contractor and

the power company wherein the independent contractor agreed to be bound by West Virginia law and to keep all employees protected by the West Virginia Workers' Compensation Fund.

After close examination of the *Gallapoo* and *Pasquale* cases, it is obvious that any reliance upon them is misplaced in this case.

Accordingly, appellants urge this Court to reverse the lower court's decision. As Mr. Russell was a non-temporary employee who had been hired to work specifically in West Virginia and the contract covering his work provided he was to be protected by the West Virginia Workers' Compensation Fund, appellant Fred Russell, Jr. is covered by the West Virginia Workers' Compensation and should be permitted to maintain a deliberate intention action against his employer under West Virginia law.

II.

THE CIRCUIT COURT ERRED IN APPLYING KENTUCKY LAW BECAUSE KENTUCKY LAW IS REPUGNANT TO THE PUBLIC POLICY OF WEST VIRGINIA

The Circuit Court should nevertheless have refused to apply Kentucky law in this case because it is repugnant to the public policy of the State of West Virginia.

The law of Kentucky forces employees to make an "election." Under the workers' compensation laws of Kentucky, employees must choose to either receive workers' compensation benefits *or* to pursue a lawsuit against their employer in the event they are injured. *See* Kentucky Revised Statute 342.650(6) (1993). By contrast,

in West Virginia, the legislature has provided for a system by which a worker may receive workers' compensation benefits *and* bring a lawsuit against his employer if the stringent requirements of the deliberate intention statute have been met. Obviously, the West Virginia Legislature and our West Virginia courts have allowed these types of recovery based upon West Virginia's strong public policy in favor of compensating persons injured by the negligence of another, including those injured as a result of their employer's negligence where the employer knowingly and intentionally exposes their employee to a known danger which presented "a high degree of risk and a strong probability of serious injury or death." *See* W.Va. Code § 23-4-2(c)(2)(ii).

The Supreme Court of Appeals of West Virginia has declined to apply laws of other states on many prior occasions for public policy reasons:

> ***[W]e have long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State.*** *Dallas v. Whitney,* 118 W.Va. 196, 188 S.E. 766 (1936). . . . ***It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.*** Accordingly, we have abolished the doctrine of interspousal immunity, *Coffindaffer v. Coffindaffer,* 161 W.Va. 557, 244 S.E.2d 338 (1978), and we have adopted the doctrine of comparative negligence in preference to the harsh rule of contributory negligence. *Bradley v. Appalachian Power Co.,* 163 W.Va. 332, 256 S.E.2d 879 (1979). We abolished charitable immunity for hospitals in *Adkins v. St. Francis Hospital,* 149 W.Va. 705, 143 S.E.2d 154 (1965). We held that

> there is no common law governmental immunity for municipal corporations in *Higginbotham v. City of Charleston*, 157 W.Va. 724, 204 S.E.2d 1 (1974). And we abrogated the doctrine of parental immunity to permit an unemancipated minor child to sue for injuries received in a motor vehicle accident in *Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721 (1976).

Paul v. National Life, 177 W.Va. 427, 352 S.E.2d 550, 556 (1987) (refusing to enforce automobile guest passenger statutes of foreign jurisdictions in West Virginia courts) (emphasis added).

Accordingly, as the Kentucky law "election" is repugnant to the public policy of the State of West Virginia which strongly favors compensating injured victims such as Mr. Russell, the lower court should have refused to apply Kentucky law. It is clear that if Mr. Russell is permitted to present his case to a jury, Mr. Russell will be able to prove he was knowingly and intentionally exposed to a specific unsafe working condition by his employer and was severely and permanently injured as a result.

CONCLUSION AND PRAYER FOR RELIEF

The issues presented herein are ripe for consideration by this Court. Based upon the foregoing, it is clear upon a *de novo* review the Circuit Court erroneously granted appellees' Motion for Summary Judgment. Appellants Fred and Rebecca Russell should be entitled to their day in Court to allow a jury to examine the egregious misconduct of his employer which left him a broken man.

Should this Court not reverse the decision of the lower court, a tragic miscarriage of justice inevitably will result.

WHEREFORE, Appellants Fred Russell, Jr. and Rebecca Russell respectfully request that this Honorable Court **REVERSE** the decision of the Circuit Court of Kanawha County and **REMAND** the case to the lower Court for further proceedings consistent with its opinion.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED RUSSELL, JR.
and REBECCA RUSSELL,

Appellants,

v.

BUSH & BURCHETT, INC., a Kentucky corporation, JOE BURCHETT, an individual, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia,

Appellees.

APPEAL NO. 28398

KANAWHA COUNTY CIVIL ACTION NO. 97-C-2182

BRIEF OF APPELLEES BUSH & BURCHETT, INC. AND JOE BURCHETT, INDIVIDUALLY

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. STATEMENT OF FACTS 4

A. Background 4

B. Appellant Is A Kentucky Resident Employed By A Kentucky Employer 7

C. Appellant Was Injured In Kentucky 8

D. Appellant Received and Enjoyed Kentucky Workers' Compensation Benefits .. 9

III. POINTS AND AUTHORITIES 9

IV. ARGUMENT 11

A. The Doctrine of Lex Loci Delicti Mandates the Application of Kentucky Law Where a Kentucky Employee Sues His Kentucky Employer Over an Accident Which Occurred in Kentucky 11

B. Even If Kentucky Law Does Not Apply, West Virginia Law Also Mandates the Dismissal of Appellants' Claims 17

C. The Contract Between Bush & Burchett and the Division of Highways Does Not Mandate Coverage Under the West Virginia Workers' Compensation Fund 21

D. The Contract Between Bush & Burchett and the WVDOH Does Not Create a Private Cause of Action Under the West Virginia Workers' Compensation Act 25

E. Appellant, As A Kentucky Resident And A Kentucky Employee Of A Kentucky Employer, Received Benefits From Kentucky Workers' Compensation And Was Not Eligible For West Virginia Workers' Compensation 27

F. The Kanawha County Circuit Court Does Not Have Subject Matter Jurisdiction Over Appellants' Claims Against Appellees 34

V. CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Ball v. Joy Mfg. Co., 755 F.Supp. 1344, (S.D.W.Va. 1990)..... 15

Bell v. Vecellio and Grogan, Inc., 475 S.E.2d 138, 140, 145 (W.Va. 1996).....19-21, 34

Blais v. Allied Exterminating Co., 482 S.E.2d 659 (W.Va.1996).....10, 13

County Court of Wayne County v. Louisa & Fort Gay Bridge Co., 46 F.Supp. 1 (S.D.W.Va. 1942).....12, 13

Easterling v. American Optical Corp., 529 S.E.2d 588 (W.Va. 2000).....15, 34, 35

Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172, 173 (W.Va. 1996).....11, 18-21, 36

Jan-Care Ambulance Service, Inc. v. Public Service Commission of West Virginia, 522 S.E.2d 912, 918 (W.Va. 1999)..... 34

Lester v. State Workmens' Compensation Commissioner, 242 S.E.2d 443, 450-451 (W.Va. 1978)..... 11, 26, 27

McKinney v. Fairchild International, Inc., 487 S.E.2d 913 (W.Va. 1997).....10, 13, 16

Mills v. Quality Supplies Trucking, Inc., 510 S.E.2d 280 (W.Va. 1998).....10, 13

Oakes v. Oxygen Therapy Services, 363 S.E.2d 130, 131 (W.Va. 1987)..... 13

Pasquale v. Ohio Power Co., 418 S.E.2d 738 (W.Va. 1991).....11, 17-21, 36

Paul v. National Life, 352 S.E.2d 550 (W.Va. 1986) 10, 13

Robinson v. Cabell Huntington Hospital, Inc., 498 S.E.2d 27 (W.Va. 1997).....11, 25, 26

State ex rel. Hammond v. Worrell, 106 S.E.2d 521 (W.Va. 1958)..... 34

Woodford v. Glenville State College Hous. Corp., 225 S.E.2d 671 (W.Va. 1976)..... 26

Young v. State Compensation Commissioner, 3 S.E.2d 517 (W. Va. 1939).....32, 33

Statutes

Kentucky Revised Statutes § 342.690 (1993)...10, 14, 15

Kentucky Revised Statutes § 342.650(6) (1993)..... 14

West Virginia Code § 23-2-1a(a)(1) (1994)..... 20

West Virginia Code § 23-2-1c(c) (1994) 17, 18, 20, 22, 28, 29, 36

West Virginia Code § 23-4-2(c)(ii) (1994).....11, 18

W.Va. Code § 55-8-12..... 26

Other

West Virginia Code of State Regulations, 85 C.S.R. 9, § 6.9(c) (1994) 28

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Now come the appellees, Bush & Burchett, Inc. (hereinafter "Bush & Burchett"), and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire, and Offutt, Fisher & Nord, and with their Brief of Appellees in opposition to the Appellants' Brief pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, hereby state as follows:

I. INTRODUCTION

Upon closer analysis, Appellants' Brief which seeks to reverse the Circuit Court's Order granting appellees' Motion for Summary Judgment fails to set forth any factual or legal arguments sufficient to reverse the Circuit

Court's Order. The legal authorities cited by appellants are clearly distinguishable or inapplicable to this case, and appellants continually attempt to muddy the record in this case by citing to irrelevant facts arising out of other accidents on other Bush & Burchett work sites which occurred several years prior to this accident. Appellants also omit numerous key facts which are adverse to their arguments.

Appellants attempt to paint a grim picture in order to evoke sympathy. However, appellants' portrait is somewhat misleading and transparent by virtue of its incompleteness. Appellees urge this Honorable Court to see through the picture painted by appellants, which must be augmented with the undisputed facts set forth below by appellees.

It is misleading for the appellants to claim that appellant Fred Russell, Jr. (hereinafter sometimes "Mr. Russell"), was working for the State of West Virginia as an employee of Bush & Burchett, Inc. (hereinafter "Bush & Burchett") and Joe Burchett. Appellants' Brief at p. 5. Mr. Russell worked for Bush & Burchett. He was an employee of Bush & Burchett. He was not an employee of Joe Burchett. Mr. Burchett is an individual who is the president of Bush & Burchett, Inc. He did not personally employ Mr. Russell. Likewise, Mr. Russell was not specifically hired to work in West Virginia, as erroneously asserted by appellants. Mr. Russell was the Kentucky employee of a Kentucky employer and worked mostly in Kentucky. Appellants' assertions to the contrary are without support.

The record does not support the assertion by appellants that they had no knowledge that Bush & Burchett had submitted a claim on Mr. Russell's behalf to Bush & Burchett's Kentucky Workers' Compensation carrier. Appellants' Brief, p. 7. In fact, an examination of the record will show the opposite to be true. It is inaccurate for appellants to claim that Mr. Russell was working on a West Virginia bridge being built by and for West Virginia on a West Virginia project. Appellants' Brief, p. 7. The undisputed evidence in this case is clear that Mr. Russell was working in Kentucky at the time of his accident. The fact that Bush & Burchett may have contracted with the West Virginia Department of Transportation, Division of Highways (hereinafter "WVDOH"), to build the bridge is irrelevant to appellants' claims. The evidence also fails to support Mr. Russell's contention that he worked continuously in West Virginia for over three (3) years prior to his injuries.

Appellants devote approximately two (2) pages of their Statement of Facts reciting plaintiff's injuries and making prejudicial allegations concerning prior Bush & Burchett projects which have no relation or relevance to the project and accident in question. Appellants' Brief at pp. 5-6. These meaningless recitations are clearly intended to engender sympathy for appellant, a Kentucky resident employed by a Kentucky employer to work in Kentucky, who was injured in Kentucky and who received workers' compensation benefits from his employer's Kentucky carrier. These assertions have nothing to do with the issues which are properly before this Honorable Court.

Appellants' Assignments of Error are also based on faulty premises. There is no evidentiary support for the assertion that appellant was a non-temporary employee hired to work specifically in West Virginia for the State of West Virginia and was covered by the West Virginia Workers' Compensation Act, as alleged by appellant. Appellants' Brief at p. 9, 10. The terms of the contract between the WVDOH and Bush & Burchett did not require appellant to be covered by the West Virginia Workers' Compensation Act and cannot create a private cause of action. Finally, there is no authority for the argument that Kentucky law violates West Virginia's public policy.

The Appellants' Brief has been crafted to persuade this Honorable Court to look away from the undisputed facts presented herein and the applicable law which requires the dismissal of appellants' claims. Applying either Kentucky or West Virginia law to the relevant and undisputed facts of this case clearly mandates the dismissal of appellants' claims against the appellees. The Circuit Court correctly applied the law to the facts presented herein and properly dismissed appellants' claims against the appellees. Appellees urge this Honorable Court to deny this Appeal and to affirm the Circuit Court's decision.

II. STATEMENT OF FACTS

A. Background

This case arises out of a November 1, 1996, accident in which appellant Fred Russell, Jr., was allegedly injured when struck by the headache ball of a crane which

allegedly caused him to fall approximately thirty (30) feet to the ground while in the course and scope of his employment with Bush & Burchett.

The project in progress at the time of appellant's accident consisted of building two (2) bridges between Pike County, Kentucky, and Mingo County, West Virginia, and involved work in both West Virginia and Kentucky. The project is sometimes referred to as the "Goodman Bridge project." At the time of the accident, the evidence is undisputed that the crane involved in the accident was located in Kentucky, that appellant was working in Kentucky, and that the accident occurred in Kentucky.

Bush & Burchett is a Kentucky corporation which maintains its corporate headquarters in Allen, Floyd County, Kentucky. Appellee Joe Burchett is the president of Bush & Burchett. See: Record, Affidavit of Joe Burchett at ¶ 1. Mr. Burchett had no specific responsibility or duties for the Goodman Bridge project after being awarded the bid for the project by the WVDOH. Prior to receiving the bid, Mr. Burchett assisted Bush & Burchett personnel in setting the price for the bid to the WVDOH. *Id* at ¶ 6. Once work on the project actually began, Bush & Burchett's project manager for the Goodman Bridge project was John Ward and the superintendent was Everett Bourland. Mr. Bourland was responsible for Bush & Burchett's day-to-day operations on the Goodman Bridge project. *Id* at ¶ 5. Mr. Burchett's only responsibility for the Goodman Bridge project was a general responsibility as president of Bush & Burchett. *Id* at ¶ 8.

As president of Bush & Burchett, Mr. Burchett visited the Goodman Bridge project site approximately once

weekly to monitor the project's progress and to determine if there were any problems which required his assistance. On such visits, he would be present at the site for as little as a few minutes or for as much as a few hours, but never for more than one-half (1/2) of the work day. *Id* at ¶ 9. When present at the Goodman Bridge project job site, Mr. Burchett generally spoke with Mr. Bourland and Mr. Ward. He did not direct or instruct any hourly employees as to what to do or how to do any particular job or task. *Id* at ¶ 10.

Mr. Burchett never directed or instructed appellant Fred Russell, Jr., as to what to do or how to do any particular aspect of his job on the Goodman Bridge project or otherwise. *Id* at ¶ 11. Mr. Burchett also never instructed Kenny Smith or any other crane operator on the Goodman Bridge project as to what to do or how to do any particular aspect of his job. *Id* at ¶ 12.

Moreover, on each occasion Mr. Burchett may have visited the Goodman Bridge project, he was present solely in his capacity as president of Bush & Burchett and at all times was acting within the course and scope of his employment and/or duties as president of Bush & Burchett. *Id* at ¶ 13. Mr. Burchett never visited the Goodman Bridge project job site in an individual capacity and never acted in an individual capacity separate and apart from his duties on behalf of Bush & Burchett. *Id*. Mr. Burchett was not present at the job site on November 1, 1996, the date of appellant's accident. *Id* at ¶ 14.

B. Appellant Is A Kentucky Resident Employed By A Kentucky Employer.

There is no question that on November 1, 1996, appellant, Fred Russell, Jr., was employed by Bush & Burchett and was working on Job 159, which was also known as the Goodman Bridge project. The location of appellant's accident, which will be discussed further, *infra*, was south of Kentucky Route 292, in Pike County, Kentucky, consistent with the interstate nature of the Goodman Bridge project. Bush & Burchett had employed Fred Russell, Jr., for a number of years. See: Record, Affidavit of Vickie Ward. Mr. Russell lives at 4374 Coon Creek, Salyersville, Kentucky. *Id.* On the Goodman Bridge project, appellant would travel each day from his home in Salyersville, Kentucky, with a co-worker in a company truck to the Job 159 job site. See: Record, Affidavit of John Ward. Once there, appellant would report for work depending on the phase of construction of the project. *Id.*

The men were paid according to which side of the bridge was worked, pursuant to regulations from the West Virginia Department of Labor, the Kentucky Department of Labor, and the United States Department of Labor. See: Record, Affidavit of Vickie Ward. As a result, there are clear records which show the location of work for purposes of payroll for the appellant. A more complete review of the reports clearly shows that for the six (6) months prior to his injury, appellant worked on three (3) different projects as an employee of Bush & Burchett: (1) appellant was employed as a carpenter and ironworker on Job 159, the Goodman Bridge project, on both

the West Virginia side and the Kentucky side; (2) appellant was employed as a carpenter on Job 156 in Johnson County, Kentucky; and, (3) appellant was employed as a carpenter on Job 145 in Pike County, Kentucky. See: Record, V. Ward Affidavit. When the full picture of appellant's employment with Bush and Burchett is analyzed, it is clear that appellant was a regularly employed **Kentucky employee**.

C. Appellant Was Injured In Kentucky.

Appellant has also confirmed that his accident occurred **in Kentucky**. Appellant testified that the area where he was working at the time of his accident was in Kentucky, and that the area where he fell after being struck by the crane was in Kentucky. See: Record, April 28, 1999 deposition of Fred Russell, Jr., Volume I at p. 29, Volume III at pp. 24-25. Mr. Russell also confirmed that he always resided in Kentucky during the time he worked for Bush & Burchett. Depo. Russell, Vol. III, pp. 45, 61. Further evidence of Mr. Russell's domicile in the Commonwealth of Kentucky is indicated by his testimony that he always filed for unemployment benefits in Kentucky. *Id.* at p. 65. Mr. Russell also received Kentucky Workers' Compensation benefits following this accident, and his medical bills were paid by Kentucky Workers' Compensation. Depo. Russell, Vol. I, p. 108.

Bush & Burchett employee, Kenny Smith, the operator of the crane involved in appellant's unfortunate accident, also testified that the crane was located in Kentucky at the time of the accident. See: Record, July 26, 1999 deposition of Kenneth Smith at pp. 206-207.

D. Appellant Received and Enjoyed Kentucky Workers' Compensation Benefits.

After Mr. Russell's November 1, 1996, work place injury, Mr. Russell received compensation payments from Bush & Burchett's Kentucky carrier, the Kentucky Associated General Contractor's Self-Insurance Fund, beginning on November 18, 1996. See: Record, Affidavit of Alice Howard. This payment paid compensation back to November 2, 1996, the day after the injury. *Id.* Each of these checks, sent weekly, clearly identified the source of payment and are each endorsed and cashed by the appellant, Fred Russell, Jr. *Id.*

Prior to receiving benefits from the Kentucky Associated General Contractor's Self-Insurance Fund, appellant participated in a telephone interview with the carrier and completed Kentucky Form 113 in order to designate physicians. *Id.* As such, it is difficult for appellant to argue that he was unaware that he was receiving compensation from the Kentucky carrier or that he had no opportunity to make a claim for West Virginia benefits. In fact, the West Virginia Workers' Compensation Appeal Board affirmed the ruling of the Workers' Compensation Office of Judges holding that appellant's claim for West Virginia Workers' Compensation benefit was **not** compensable. This Honorable Court refused a Petition for Appeal of that decision.

III. POINTS AND AUTHORITIES

1. Under the doctrine of *lex loci delicti* the substantive rights between the parties are to be determined by the law of the place of the injury. *Mills v. Quality Supplies*

Trucking, Inc., 510 S.E.2d 280 (W.Va. 1998); *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997); *Blais v. Allied Exterminating Co.*, 482 S.E.2d 659 (W.Va.1996); *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986). In this case, as appellants chose to file this civil action in West Virginia based upon a cause of action that arose in Kentucky, this Honorable Court should apply the substantive law of Kentucky, as the Circuit Court correctly concluded.

2. Kentucky Revised Statutes § 342.690 (1993) provides, in pertinent part:

> (1) If an employer secures payment of compensation as required by this chapter, **the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer** to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. (Emphasis added).

In this case, it is undisputed that appellants have accepted Kentucky Workers' Compensation benefits. Therefore, that election is their exclusion remedy under Kentucky law, and appellants cannot maintain this action against these appellees.

3. A non-resident employee who was injured in this state and is protected under the terms and provisions of the Workers' Compensation laws of a foreign state shall not be entitled to the benefits and privileges provided under the West Virginia Workers' Compensation Act,

including the right to file and maintain a deliberate intention cause of action under West Virginia Code § 23-4-2(c)(ii) (1994). Syl. pt. 3, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996). See also: Syl pt. 3, *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991).

4. In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration. Syl. pt. 2, *Robinson v. Cabell Huntington Hospital, Inc.*, 498 S.E.2d 27 (W.Va. 1997).

5. The contract between Bush & Burchett and the WVDOH does not create a private cause of action for appellants under the West Virginia Workers' Compensation Act. *Lester v. State Workmens' Compensation Commissioner*, 242 S.E.2d 443 (W.Va. 1978).

IV. ARGUMENT

A. The Doctrine of Lex Loci Delicti Mandates the Application of Kentucky Law Where a Kentucky Employee Sues His Kentucky Employer Over an Accident Which Occurred in Kentucky.

1. The accident occurred in Kentucky.

Clearly, the inescapable conclusion reached when examining the facts of this case is that Kentucky law must be applied to appellants' claims against appellees Bush & Burchett and Joe Burchett. The evidence is undisputed

that Bush & Burchett is a **Kentucky** corporation. Joe Burchett is the president of Bush & Burchett and also resides in **Kentucky**. **Appellant is a lifetime resident of the Commonwealth of Kentucky, specifically, Salyersville, Kentucky**. This Kentucky employee of a Kentucky employer was provided Workers' Compensation benefits in Kentucky by a Kentucky insurance carrier. Finally, and most importantly, the evidence is undisputed that the location of appellant's injury was **Pike County, Kentucky**.

The mere fact that appellant may have been assisting in the construction of a bridge which was to be owned by the state of West Virginia does not mean that appellant was in West Virginia at the time of his accident. There is no legal authority for such a proposition; in fact, the weight of authority is to the contrary. In *County Court of Wayne County v. Louisa & Fort Gay Bridge Co.*, 46 F.Supp. 1 (S.D.W.Va. 1942), the court addressed the issue of whether a county court (now county commission) could condemn a privately owned toll bridge extending from West Virginia into Kentucky without the permission of the Commonwealth of Kentucky or the owner of such bridge. The court noted that the "boundary line between Kentucky and West Virginia is the middle of Tug Fork of Big Sandy River." *Id.* at 2. Furthermore:

> [N]o state can take or authorize the taking of property located in another state. Each state holds all of the property within its territorial limits free from the eminent domain of all other states. To argue that the people of West Virginia have any inherent right to take property located in Kentucky from a citizen of that state, is to assert that the sovereignty of West Virginia

> extends to some extent over the soil of Kentucky. To state the proposition is to refute it. (Citations omitted). . . . A state cannot own or acquire property in another state without its consent. *Id.*

2. Kentucky law applies.

Clearly then, there can be no dispute that appellant's injury occurred in Kentucky, not West Virginia. Appellants' counsel conceded this point in oral argument during a hearing held before the Circuit Court. The fact that the injury occurred in Pike County, Kentucky is especially important in light of the fact that West Virginia courts apply the *lex loci delicti* choice of law rule when it is arguable that two (2) forums should hear an action. *Mills v. Quality Supplies Trucking, Inc.*, 510 S.E.2d 280 (W.Va. 1998); *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997); See also: *Blais v. Allied Exterminating Co.*, 482 S.E.2d 659 (1996); *Paul v. National Life*, 352 S.E.2d 550 (W.Va. 1986). Under the doctrine of *lex loci delicti*, the substantive rights between the parties are to be determined by the law of the place of the injury. *Id.* West Virginia's adherence to the *lex loci delicti* doctrine has been particularly pervasive in clean-cut cases of physical injury, such as this case. *Oakes v. Oxygen Therapy Services*, 363 S.E.2d 130, 131 (W.Va. 1987).

West Virginia's connection to this case is tenuous, at best. It is undisputed that appellant, **a Kentucky resident**, was hired by a **Kentucky** employer to work primarily in **Kentucky**, that appellant was injured in **Kentucky**, and received benefits from his employer's **Kentucky** Workers' Compensation carrier. In this case, as appellants

chose to file this civil action in West Virginia based upon a cause of action that arose in Kentucky, the Circuit Court correctly applied the substantive law of Kentucky.

3. Kentucky law mandates dismissal of the case.

When Kentucky law is applied, it is clear that the appellants' action against Bush & Burchett and Joe Burchett should be dismissed. Unlike the West Virginia Workers' Compensation system, Kentucky Workers' Compensation is provided through private carriers, albeit structured according to the Kentucky Workers' Compensation Act. Kentucky employees have a choice to make regarding Workers' Compensation coverage. First, the employee may elect to receive Workers' Compensation benefits as set forth by statute in the Commonwealth of Kentucky and paid for by the private carrier of his or her employer. Second, the employee may opt not to accept benefits, in accordance with the rules and regulations of the Kentucky Workers' Compensation Statute, and pursue an action against the employer. K.R.S. 342.650(6)(1993). The importance of that election is that the employee who elects to receives [sic] Workers' Compensation benefits in Kentucky is barred from pursuing an action against his employer, including a "deliberate intention action" by the exclusive remedy provision of the Kentucky Workers' Compensation Statute. That statute, K.R.S. 342.690 (1993), provides, in pertinent part:

> (1) If an employer secures payment of compensation as required by this chapter, **the liability of such employer under this chapter shall be exclusive and in place of all other liability of**

> **such employer** to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. (Emphasis added).

In this case, the evidence is undisputed that appellants have accepted Kentucky Workers' Compensation benefits. Therefore, that election is their exclusive remedy under Kentucky law, and appellants cannot maintain this action against these appellees. This Circuit Court correctly applied the law of Kentucky and correctly dismissed appellants' claims against these appellees.

4. Kentucky Law Does Not Violate West Virginia Public Policy.

Kentucky Workers' Compensation law is not repugnant to the public policy of West Virginia. In the recent case of *Easterling v. American Optical Corp.*, 529 S.E.2d 588 (W.Va. 2000), this Honorable Court, in considering the issue of whether to apply the West Virginia Workers' Compensation Act or the workers' compensation law of a foreign state, stated:

> "The general rule pertaining to the issue raised here is that 'if a damage suit is brought in the forum state by the employee against the employer . . . , **the forum state will enforce the bar created by the exclusive-remedy statute of a state that is liable for workers' compensation[.]**' (citation omitted). On the other hand, if the workers' compensation laws of the foreign state permit a tort action by an employee against

> an employer then such an action may be maintained in the **forum state through application of the laws of the foreign state.**"

Id. at p. 598 (emphasis added). See also: *Ball v. Joy Mfg. Co.*, 755 F.Supp. 1344, (S.D.W.Va. 1990) (District Court found Virginia Workers' Compensation law did not violate West Virginia public policy, although Virginia Workers' Compensation law did not contain a deliberate intent exception).

Clearly, based on that pronouncement, this Honorable Court does not consider the bar created by the exclusive-remedy statue of a foreign state's workers' compensation law to be repugnant to West Virginia public policy as alleged by appellants. Moreover, Kentucky law does not deny compensation to an injured party as argued by appellants. Kentucky law merely forces an employee to elect between receiving workers' compensation benefits and pursuing an action at law against his or her employer. The choice is the employee's; either way the employee is compensated, in accordance with public policy. Granting the relief sought by appellants would encourage forum shopping, which this Honorable Court seeks to discourage when applying choice of law principles. *McKinney*, 487 S.E.2d 913, 923.

None of the cases cited by appellants in support of their argument are on point, nor are they persuasive. Kentucky Workers' Compensation law is not repugnant to West Virginia's public policy which strongly favors compensating injured victims because Mr. Russell **was permitted compensation** under Kentucky law. The only difference between Kentucky and West Virginia Workers' Compensation law, in this respect, is that under Kentucky

law Mr. Russell must elect whether to receive workers' compensation benefits or to pursue a civil action against his employer; he is not permitted to do both. Either way, he is compensated for his injuries. Therefore, appellants' public policy argument is obviously without merit.

B. Even If Kentucky Law Does Not Apply, West Virginia Law Also Mandates the Dismissal of Appellants' Claims.

Even if this Honorable Court should find that West Virginia law applies to appellants' claims against Bush & Burchett and Joe Burchett, as a matter of law a **Kentucky** employee of a **Kentucky** employer who is covered under **Kentucky** Workers' Compensation law cannot maintain a "deliberate intention" cause of action under West Virginia law, regardless of whether the injuries occurred in West Virginia or Kentucky.

West Virginia Code § 23-2-1c(c) provides:

> If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than this state, such employee and his dependents shall not be entitled to the benefits payable under this chapter on the count of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on a count of such injury, disease or death.

This Honorable Court has previously interpreted this statute in cases which are strikingly similar to this case. In *Pasquale v. Ohio Power Co.*, 418 S.E.2d 738 (W.Va. 1991), the Court was faced with a non-resident employee of a non-resident employer, temporarily employed in West Virginia and who sought to pursue a "deliberate intention" cause of action in West Virginia. Dismissing the claim, the Court held:

> West Virginia Code § 23-2-1c(c) (1975), makes the compensation law of another state the exclusive remedy against the employer for a non-resident employee who is temporarily employed in this state, if such employee is injured in this state and is covered by his or her employer's workers' compensation in the other state.

Syl. Pt. 3, *Pasquale*, 418 S.E.2d at 741.

More recently, in *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996), the Court again faced a non-resident employee of a non-resident employer who sought to avail himself of a "deliberate intention" cause of action against the employer under West Virginia Code § 23-4-2(c)(ii). The Court held:

> Therefore, a non-resident employee's rights against his employer would be exclusively under the laws of the foreign state, and no remedy would be available against that employer in West Virginia under our deliberate intention statute, West Virginia Code § 23-4-2(c)(ii)(1994).

Syl. Pt. 2, *Gallapoo*, 475 S.E.2d at 173.

The Court further explained that:

> A non-resident employee who is injured in this state and is protected under the terms and provisions of the workers' compensation laws of a foreign state shall not be entitled to the benefits and privileges provided under the West Virginia Workers' Compensation Act, including the right to file and maintain a deliberate intention cause of action under West Virginia Code § 23-4-2(c)(ii)(1994). *Id.*, Syl. Pt. 3.

Pasquale involved an Ohio employer, an employee who was an Ohio resident, and the employee was injured in West Virginia. *Gallapoo* involved an Indiana employee of an Indiana employer who was also injured in West Virginia. In the case at bar, appellant was the Kentucky employee of a Kentucky employer. The evidence is undisputed that appellant was injured in Kentucky. However, even if this Honorable Court finds that appellant suffered injury in West Virginia or that West Virginia law should apply, West Virginia Code § 23-2-1c(c), *Pasquale* and *Gallapoo* mandate the dismissal of this claim.

Appellants cite *Bell v. Vecellio and Grogan, Inc.*, 475 S.E.2d 138 (W.Va. 1996), for the proposition that West Virginia law should permit appellant to pursue his deliberate intent cause of action against Bush & Burchett and Joe Burchett in this matter. However, the facts of that particular case are clearly distinguishable from the facts presented herein, and actually are the opposite of the factual situations presented in *Gallapoo* and *Pasquale*, cases on which these appellees rely and which are controlling precedent.

In *Bell*, an employee who was injured while on the job in Maryland attempted to file a deliberate intent action against his employer in West Virginia. After the Circuit Court granted the employer's Motion for Summary Judgment the employee appealed. This Honorable Court reversed the decision of the lower court to permit the employee's deliberate intent action to go forward. However, the employee in *Bell* was a West Virginia resident, employed by a West Virginia employer, with the origin of that employment relationship being in West Virginia. 475 S.E.2d at 140, 145. Those facts are clearly distinguishable from the facts presented herein, in which appellant, Fred Russell, Jr., was a **Kentucky** employee of Bush & Burchett, a **Kentucky** employer, and was injured in **Kentucky**. The facts in *Bell* clearly fall within West Virginia Code § 23-2-1a(a)(1), which provides that persons regularly employed in West Virginia whose duties necessitate employment of a temporary or transitory nature by the same employer outside the state are included within the class of employees subject to Chapter 23 of the West Virginia Code, the Workers' Compensation Act.

Conversely, the facts presented in this case clearly fall under West Virginia Code § 23-2-1c(c), which provides that an employee who is a resident of a state other than West Virginia and who is subject to the terms and provisions of the Workers' Compensation law or similar laws of that foreign state shall not be entitled to the benefits payable under the West Virginia Workers' Compensation Act because of injury, disease or death; rather, the rights of any such employee are to be determined under the laws of the foreign state, which shall be the

exclusive remedy against the employer. The facts of this case are on point with the facts presented in *Gallapoo* and *Pasquale*, with the exception of the location of the injury, which gives further weight to the application of Kentucky law.

Appellants falsely assert that the "parties in this case agreed by written contract that West Virginia law would apply." Appellants' Brief, p. 8. That statement is without support. Bush & Burchett and the WVDOH may have agreed that West Virginia law would govern the contract between those two parties; there is no such argument between Bush & Burchett and appellant which would result in the application of West Virginia law. However, if West Virginia law applies, the outcome of this case must be determined pursuant to *Gallapoo* and *Pasquale*. Both *Gallapoo* and *Pasquale* hold that the employee's remedy was under the law of the foreign state, not under West Virginia law. Under the facts of this case, *Gallapoo* and *Pasquale* are clearly controlling precedent; *Bell* clearly has no application to this case. Moreover, *Bell* did not overturn or reverse either the *Pasquale* or *Gallapoo* cases. In fact, the *Gallapoo* case was decided by the Court two (2) days **after** the *Bell* case. West Virginia law mandates the dismissal of appellants' claims against the appellees.

C. The Contract Between Bush & Burchett and the Division of Highways Does Not Mandate Coverage Under the West Virginia Workers' Compensation Fund.

Appellants argue that the state contract under which Bush & Burchett was awarded the Goodman Bridge project required it to cover all of its employees, regardless of

residency or other coverage, under the West Virginia Workers' Compensation Fund. A careful reading of the contract as well as an examination of the parties' intentions as demonstrated in sworn testimony reveals that the contract does not create the obligations advanced by appellants.

The contract at issue is a form contract that is computer generated on all state construction jobs and which contains the following language under Section IV:

> Contractor [Bush & Burchett, Inc.] agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and all other legal requirements not mentioned herein, or specified; to keep all employees on said work protected by the Workers' Compensation Fund **in compliance with the act of the legislature of West Virginia, known as the Workers' Compensation Act,** which is made a part hereof. . . .

See Record, Contract, Section IV (emphasis added).

The key language which defeats the appellants' argued obligation is the qualifying language "in compliance with the act of the legislature of West Virginia, known as the Workers' Compensation Act." This language does not require that every employee must be protected under the West Virginia Workers' Compensation Fund, but, rather that the employees are protected **in compliance with the Act**. Accordingly, an employer such as Bush & Burchett who regularly employs its Kentucky employees and provides Workers' Compensation coverage for them under the state of their residence, Kentucky, clearly complies with the Act, especially in light of the language of W. Va. Code § 23-2-1c(c) discussed above.

This view is supported by the sworn testimony with regard to the origins of the contract clause and its intended effects by the drafter. Robert K. Tinney, a professional engineer for the WVDOH whose deposition was taken on January 20, 1998, is the WVDOH agent with the most knowledge about the contract. See: Record, January 20, 1998 Deposition of Robert K. Tinney. Specifically, Mr. Tinney testified that the contract did not require all employees to be covered by **West Virginia** Workers' Compensation, only that all employees had Workers' Compensation coverage. Tinney Depo., p. 15, ll. 19-24. Further, Tinney testified as follows regarding the intent of the contract:

> **A. The intent was just for the worker to have proper protection as an employee if he is injured or hurt on the job in accordance with the requirements of the Workers' Compensation Commission, if that is the proper name for it.**
>
> **Q. And if the employer provided such coverage and the West Virginia Workers' Compensation Fund denied protection in West Virginia, then the employer would have carried through with your idea of your obligations imposed on them by the contract, correct?**
>
> **A. Yes, my idea, yes.**

Tinney Depo., p. 22, l. 6 through p. 23, l. 9 (bold emphasis added).

Likewise, the deposition of Joe Burchett, President of Bush & Burchett, has been taken with regard to the intentions of Bush & Burchett in entering into the contract

between the WVDOH and Bush & Burchett. See Record, Deposition of Joe Burchett. Mr. Burchett testified:

> We're just providing all of our employees with Workers' Compensation coverage. We don't make the determination of which company or which policy covers which employees. We just make all of our employees covered by Workers' Compensation insurance. Some of the Kentucky residents that are working temporarily out of state have coverage under the Kentucky policy. I think – it is my understanding that West Virginia does not cover temporary employees working in the State of West Virginia if they are covered by another comp carrier.

Burchett Depo., p. 11, l. 24 through p. 12, l. 14. See also Record, Letter from Kentucky Associated General Contractor's Self-Insurers' Fund. Later, Joe Burchett clarified that Bush & Burchett purchased both West Virginia and Kentucky coverage to comply with the contract, but said it had no input or made no determination as to who was covered by each policy. Burchett Depo., p. 22, ll. 6-21. The *Howard* case cited by appellants has no precedential value and clearly contradicts the parties' intent.

As one can see, neither Robert Tinney, as the most knowledgeable witness for the WVDOH, nor Joe Burchett, as president of Bush & Burchett, testified that they intended to obligate Bush & Burchett to cover **each and every employee** under the West Virginia Workers' Compensation Fund. Both parties to the contract indicated that their understanding of the obligations under the clause are to insure that all employees of Bush & Burchett have Workers' Compensation coverage, regardless of location. As this project involved work in two (2) states

due to the bridge's design, Bush & Burchett took the most appropriate course of action – procuring Workers' Compensation coverage from carriers in both states so that all employees would have Workers' Compensation coverage regardless of their residency. Appellants have also recognized the validity of this argument, stating: **"the W.Va.DOH has no institutional interest in what Fund covers injured Bush & Burchett employees."** (emphasis added). See: Record, Plaintiffs' Response in Opposition to Defendants' Bush & Burchett and Joe Burchett's Motion for Summary Judgment at p. 9.

Moreover, accepting appellants' argument not only would be contrary to the contracting parties' specifically declared intent, but could also lead to an absurd and unjust result. Because Bush & Burchett obtained workers' compensation coverage for appellant in Kentucky, did its West Virginia workers' compensation premiums provide coverage for appellant? Or could Bush & Burchett be found to be in default with West Virginia workers' compensation and therefore be stripped of its common-law defenses to a West Virginia "deliberate intent" action, even though Bush & Burchett obtained workers' compensation coverage for appellant in Kentucky? The answer must be "no," because appellant accepted Kentucky benefits and cannot establish a private cause of action based on this contract.

D. The Contract Between Bush & Burchett and the WVDOH Does Not Create a Private Cause of Action Under the West Virginia Workers' Compensation Act.

The argument that Mr. Russell is a third-party beneficiary of the contract between the WVDOH and Bush & Burchett and, therefore is covered pursuant to the West Virginia Workers' Compensation Act is also without legal support. Appellants' reliance on the recent case of *Robinson v. Cabell Huntington Hospital, Inc.*, 498 S.E.2d 27 (W.Va. 1997), is misplaced. The *Robinson* Court held, at Syl. Pt. 2:

> In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

The *Robinson* Court also held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's **sole** benefit (emphasis added). *Id.* at p. 32. The *Robinson* Court went so far as to distinguish and modify its earlier decision in *Woodford v. Glenville State College Hous. Corp.*, 225 S.E.2d 671 (W.Va. 1976), a case also cited by appellants. The *Robinson* Court stated that the plain wording of W.Va. Code § 55-8-12, regarding third party beneficiaries to contracts, merits such a restrictive interpretation. *Robinson*, 498 S.E.2d at 32, fn. 5. Mr. Russell was clearly not the **sole** beneficiary

of the contract by and between the WVDOH and Bush & Burchett.

Secondarily, the appellants' argument attempts to revive the "contract theory" which was used by many jurisdictions to analyze workers' compensation issues prior to the mid to late 1970's. In *Lester v. State Workmen's Compensation Commissioner*, 242 S.E.2d 443 (1978), this Honorable Court rejected the "contract theory," holding that rights and duties under the Workers' Compensation Act are not contractual but arise out of the "employer-employee status." *Id.* at pp. 450-51. In light of the rejection of this contract theory for creating rights under the West Virginia Workers' Compensation Act, it is clear that even if the contracting parties had intended such benefits, which they clearly did not, such intent would not be effective under the Act.

The result advanced by appellants would also be contrary to the clear intent of the West Virginia Legislature. No other result can be intended or inferred. The Act is a statutory, administrative scheme. It does not create a contractual relationship, and **no contract** can create a right to the administrative remedies, rights or benefits under the West Virginia Workers' Compensation Act. Appellants' argument to the contrary is without merit and must be dismissed.

E. Appellant, As A Kentucky Resident And A Kentucky Employee Of A Kentucky Employer, Received Benefits From Kentucky Workers' Compensation And Was Not Eligible For West Virginia Workers' Compensation.

It is undisputed that appellant Fred Russell, Jr. is a Kentucky resident, employed by Bush & Burchett, a Kentucky employer, and who was eligible for and received Workers' Compensation from the Kentucky Associated General Contractor's Self-Insurers' Fund. See: Record, Affidavit of Alice Howard. The appellants argue that under the West Virginia Workers' Compensation Act, however, Mr. Russell is entitled to benefits from the West Virginia Workers' Compensation Division notwithstanding the fact that he was a regularly employed Kentucky employee. West Virginia Code § 23-2-1c(c) (1994) reads, in pertinent part:

> If the employee is a resident of a state other than this state [West Virginia] and is subject to the terms and provisions of the Workers' Compensation law or similar laws of a state other than this state, such employee and his dependant shall not be entitled to the benefits payable under this Chapter on account of injury, disease, or death in the course of and as a result of employment temporarily within this state, and the rights of such employee and his dependants under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease or death.

W. Va. Code § 23-2-1c(c) (1994).

The appellants further support this argument with a section of the West Virginia Code of State Regulations

purportedly dealing with extra territorial coverage. Under 85 C.S.R 9, § 6.9(c):

> The Workers' Compensation Division respects the extra territorial right of the Workers' Compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while performing work in the State of West Virginia for a temporary period not to exceed ninety (90) days. . . .

85 C.S.R. 9, § 6.9(c) (1994).

The appellants argue that this regulation specifically defines the term "temporarily" found within the statute, W. Va. Code § 23-2-1c(c). In fact, the statutory language appears to define the "temporary" employee as an employee who meets the statutory requirements of: 1) out of state residency; and 2) being subject to the terms and provisions of another state's Workers' Compensation law. W. Va. Code § 23-2-1c(c) (1994). Accordingly, to the extent that the Code of State Regulation Section is incompatible with the statute's apparent definition of a "temporary" employee, then the statutory language should be construed as superior to that of the regulation. Following that construction, it is clear that Mr. Russell, as a Kentucky resident employee of a Kentucky employer who was eligible for and received Kentucky Workers' Compensation coverage, should be precluded from receiving West Virginia Workers' Compensation benefits under W. Va. Code § 23-2-1c(c).

Notwithstanding that apparently simple resolution of the protest, even if the appellants' argued construction of

a ninety (90) day limitation were used to define "temporary," the same result would be reached. The appellants state that Mr. Russell worked in West Virginia for well over the ninety (90) day period which makes him a West Virginia employee. Appellant's Brief, p. 4. In support of this proposition, the appellants submit the state certified payroll report from Bush & Burchett regarding Job 159. These documents show the payroll information for the employees on the project, including Fred Russell, Jr. See: Record, V. Ward Affidavit.

Looking at the summary of hours and locations worked by the claimant for Bush & Burchett for the period May 1, 1996 to November 1, 1996, it is clear that from May 5, 1996 to May 29, 1996, Mr. Russell worked on the West Virginia side of the Goodman Bridge project as a carpenter and also as an ironworker. *Id.* From May 30, 1996 to June 3, 1996, Mr. Russell worked on Job 156 for Bush & Burchett which involved the construction of an interchange with two (2) bridges at the junction of U.S. Route 23 and U.S. Route 460 in Johnson County, Kentucky. *Id.* Next, from June 4, 1996 through July 16, 1996, Mr. Russell worked exclusively on the Kentucky side of the Goodman Bridge project except for one (1) shift of work on June 28, 1996. *Id.* After working on the West Virginia side of the project from July 18, 1996 through August 22, 1996, **Mr. Russell then left the Goodman Bridge project and worked from August 22, 1996 through September 28, 1996 at Job 145 for Bush & Burchett, Inc.** *Id.* This project involved the construction of a bridge on a four-lane road near a coal mine in Pike County, Kentucky. From September 30, 1996 to the date of his accident, November 1, 1996, Mr. Russell often split his

days between work as a carpenter on the Kentucky side and on the West Virginia side. *Id.* In fact, on the date of his injury, Mr. Russell worked exclusively on the Kentucky side of the bridge. *Id.*

It is clear from this summary of the hours and locations worked by Mr. Russell for the ninety (90) days prior to his injury and, in fact, even for the six (6) months prior to his accident, Mr. Russell had not worked ninety (90) consecutive working days on this project or in West Virginia. In fact, as is compatible with his status as a regularly employed Kentucky employee, Mr. Russell worked for significant periods of time on jobs wholly within the Commonwealth of Kentucky – Jobs 156 and 145 in Johnson County and Pike County, respectively. Accordingly, even if the appellants' ninety (90) day construction were used, the [sic] Mr. Russell **did not** work in such a way as to establish himself as a regularly-employed "West Virginia employee." Therefore, he is clearly not entitled to West Virginia Workers' Compensation benefits.

Appellants' claim for Workers' Compensation benefits in Kentucky was compensable, and the evidence is undisputed that Mr. Russell accepted and enjoyed Kentucky Workers' Compensation benefits following his unfortunate accident. See: Record, Affidavit of Alice Howard. Each of the checks which Mr. Russell received clearly identified the source of payment and each are endorsed and cashed by Mr. Russell. *Id.* Moreover, Mr. Russell participated in a telephone interview with the carrier and completed Kentucky Form 113 in order to designate physicians prior to receiving such benefits. *Id.* In fact, the appellants' claims for Workers' Compensation benefits in West Virginia have consistently been ruled **not**

to be compensable in this case. The Workers' Compensation Commissioner, the Workers' Compensation Office of Judges, and the Workers' Compensation Appeal Board have each found that Mr. Russell's claim is **not** compensable. Appellants appealed these rulings to this Honorable Court, which refused the petition. None of those entities ever remotely indicated that appellants' claim would have been compensable if it was timely filed.

Appellees do not dispute appellants' assertion that Mr. Russell received West Virginia workers' compensation benefits for a previous injury. Appellants' Brief, p. 14. However, appellants fail to note that the compensable injury referred to occurred on a project in Logan County, West Virginia in 1986 or 1987. See Record, Depo. Russell, Vol. II, p. 6; Vol. III, p. 53. That accident clearly has no relevance to the issues currently before the Court.

The appellants argue that Bush & Burchett improperly filed Mr. Russell's claim for Workers' Compensation benefits in Kentucky in order to avail itself of Kentucky law, which is more advantageous to the employer. See Appellants' Brief, pp. 15-16, fn. 5. This is pure conjecture. Vicki H. Ward, who is the office manager for Bush & Burchett and the person responsible for filing notices of injury, testified that no such motivation entered the process. See: Record, V. Ward Affidavit. Ms. Ward testified that once the foremen submitted the information for the notice of injury, the same was sent to the Kentucky Workers' Compensation carrier based on the fact that Mr. Russell was a regularly employed Kentucky employee

who resided in the Commonwealth of Kentucky. *Id.* Furthermore, premiums were paid for him under the Kentucky Workers' Compensation policy and that was the proper designation for the notice to be sent. *Id.*

This Honorable Court has previously addressed a similar claim to that advanced herein. In *Young v. State Compensation Commissioner*, 3 S.E.2d 517 (W. Va. 1939), the Court recognized that the impetus and responsibility for asserting a claim lies with the applicant himself. The Court then analyzed the reliance on the employer under principles of agency. The Court explained:

> Therefore, when the claimant relied on Allen [employer] to forward his application to the compensation commissioner, it may reasonably be contended that he made Allen [employer] his agent for that purpose, and cannot now rely on his agent's failure to perform the task assigned to him.

Young, 3 S.E.2d at 520. The Court went on to hold that:

> The claimant must actively participate to the extent not only of seeing that his application is made out, signed and sworn to, but also filed in the office of the commissioner within the statutory period. *Id.*

In the case at hand, there is absolutely no evidence of employer misconduct. There is evidence, however, that Mr. Russell participated in the telephone interview with Kentucky Associated General Contractor's Self-Insurers' Fund prior to the approval of his claim, that he completed Form 113 for the Kentucky Associated General Contractor's Self-Insurers' Fund, and that he accepted fourteen (14) months of Workers' Compensation benefits from the

employer's Kentucky carrier. See: Record, A. Howard Affidavit.

The evidence is clear that Mr. Russell was aware of the claim being filed in Kentucky and that he received Workers' Compensation benefits from Kentucky. If he disagreed with this action, he could have taken remedial action months earlier. The decision to contest the appellant's failure to timely file for West Virginia benefits appears to be a decision made in hindsight because of a possible effect on legal strategy. The fact that appellant waited fourteen (14) months to attempt to enforce his legal rights in West Virginia is not a problem created by the employer. Rather, it is a problem created by the appellant's unjustified failure to contest his Kentucky benefits or to seek his West Virginia benefits for fourteen (14) months following his injury.

F. The Kanawha County Circuit Court Does Not Have Subject Matter Jurisdiction Over Appellants' Claims Against Appellees.

Although appellees have not previously raised the issue of subject matter jurisdiction, an issue of jurisdiction may be raised for the first time on appeal. *Easterling v. American Optical Corp.*, 529 S.E.2d 588, 597 (W.Va. 2000); *Jan-Care Ambulance Service, Inc. v. Public Service Commission of West Virginia*, 522 S.E.2d 912, 918 (W.Va. 1999); *State ex rel. Hammond v. Worrell*, 106 S.E.2d 521 (W.Va. 1958).

Because appellant is a Kentucky resident, appellees are a Kentucky corporation and a Kentucky resident, and

the accident and injuries complained of occurred in Kentucky, the appellants must bring their cause of action in Kentucky. *Easterling v. American Optical Corp.*, 529 S.E. 2d 588. In *Easterling*, an out-of-state employee sued his former out-of-state corporate employer alleging that he developed silicosis as a result of sandblasting work for his employer, some of which was performed in West Virginia. In asserting that the trial court lacked subject matter jurisdiction, the employer cited *Gallapoo* and *Bell* for its argument. The *Easterling* court stated that the facts in *Easterling* fit squarely under the prohibition of *Gallapoo* and held that the circuit court did not have subject matter jurisdiction over plaintiffs' deliberate intent cause of action against the employer. *Easterling*, 529 S.E.2d at 598. The *Easterling* court specific [sic] held:

> The courts of West Virginia have subject matter jurisdiction over a cause of action brought by an out-of-state employee against an out-of-state employer **for an injury occurring in West Virginia,** where the complaint can be fairly read as setting out a cause of action under the laws of the foreign jurisdiction where the employer is situate, and wherein the employer is obligated to carry some form of workers' compensation. (emphasis added).

Syl. pt. 5, *Easterling*, 529 S.E.2d 588. Of course, a key component of the holding stated above is that the injury must have occurred in West Virginia in order to justify subject matter jurisdiction where both the employee and employer are out-of-state. Here, it is undisputed that the injury occurred in Kentucky. The circuit court did not have subject matter jurisdiction of appellants' claims and

appellants' claims against the appellees' must be dismissed.

V. CONCLUSION

This Honorable Court is confronted with the following undisputed facts in applying the doctrine of *lex loci delicti*: (1) the appellant/employee is a **Kentucky** resident; (2) the appellee/employer is a **Kentucky** corporation, with its president also being a **Kentucky** resident; (3) the accident and injuries complained of occurred in the Commonwealth of **Kentucky**; and, (4) the appellant accepted **Kentucky** Workers' Compensation benefits, while his claim for West Virginia Workers' Compensation benefits has been found to be **not** compensable. Clearly, Kentucky law must apply to this action. Kentucky Workers' Compensation law mandates the dismissal of appellants' claims against both Bush & Burchett and Joe Burchett, individually, as the Circuit Court correctly concluded. Nor is Kentucky law repugnant to West Virginia public policy.

Even if this Honorable Court were to hold that West Virginia law applies, West Virginia law also mandates the dismissal of appellants' claims against Bush & Burchett and Joe Burchett, regardless of the location of the injury. Where, as here, a non-resident employee of a non-resident employer is covered by the workers' compensation laws of a foreign state, the non-resident employee may not maintain his "deliberate intention" cause of action against the non-resident employer under West Virginia law. This result is well-established under West Virginia law and is mandated by West Virginia Code § 23-2-1c(c),

Pasquale and *Gallapoo*. Although the evidence is clear and undisputed that appellant's injury occurred in Kentucky, West Virginia law would mandate the dismissal of appellants' claims even if the injury was found to have occurred in West Virginia, rather than Kentucky.

Furthermore, appellant clearly was not a third-party beneficiary of the contract by and between Bush & Burchett and the WVDOH, which does not create a private cause of action for appellant. The parties to the contract also testified that it was not their intent that all employees of Bush & Burchett be covered by West Virginia Workers' Compensation; only that they have some workers' compensation coverage. The Circuit Court was absolutely correct when it applied the law to the undisputed facts of this case, granted appellees' Motion for Summary Judgment and dismissed appellants' claims against the appellees. That result should be affirmed. Alternatively, the circuit court lacks subject matter jurisdiction over appellants' claims against the appellees and appellants' claims must be dismissed, with prejudice.

WHEREFORE, for all of the foregoing reasons, appellees, Bush & Burchett, Inc., and Joe Burchett, individually, by counsel, hereby respectfully request that this Honorable Court refuse and deny the Appellants' Appeal and affirm the Circuit Court's Order dismissing appellants' claims against them, with prejudice, for an award of their attorneys' fees and costs incurred in the defense of this

matter, and for such other relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,

BUSH & BURCHETT, INC., and
JOE BURCHETT,

BY COUNSEL,

Scott W. Andrews, Esquire (#5772)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED RUSSELL, JR.
and **REBECCA RUSSELL,**

Plaintiffs/Appellants,

v.

BUSH & BURCHETT, INC., a Kentucky corporation, **JOE BURCHETT**, an individual, **WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS**, a public agency of the State of West Virginia,

Defendants/Appellees

STATE BOARD OF RISK AND INSURANCE MANAGEMENT,

Appellee.

APPEALS NO.28398 and 28720

KANAWHA COUNTY CIVIL ACTION NO. 97-C-2182

PETITION FOR REHEARING OF APPELLEES, BUSH & BURCHETT, INC. AND JOE BURCHETT, INDIVIDUALLY

SUBMITTED BY:

Scott W. Andrews, Esquire (#5772)
Offutt, Fisher & Nord
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868
Counsel for Bush and Burchett Inc., and Joe Burchett

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED RUSSELL, JR.
and **REBECCA RUSSELL,**

Plaintiffs/Appellants,

v.

BUSH & BURCHETT, INC., a Kentucky corporation, **JOE BURCHETT**, an individual, **WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS**, a public agency of the State of West Virginia,

Defendants/Appellees

STATE BOARD OF RISK AND INSURANCE MANAGEMENT,

Appellee.

APPEALS NO.28398 and 28720

KANAWHA COUNTY CIVIL ACTION NO. 97-C-2182

PETITION FOR REHEARING OF APPELLEES, BUSH & BURCHETT, INC. AND JOE BURCHETT, INDIVIDUALLY

COME NOW the Appellees, Bush & Burchett, Inc. and Joe Burchett, individually, by counsel, Scott W. Andrews, Esquire and Offutt, Fisher & Nord, and with their Petition for Rehearing pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure, and hereby state as follows:

I. INTRODUCTION

Bush & Burchett, Inc. and Joe Burchett hereby petition this Honorable Court for a rehearing of its November 28, 2001, Opinion (released on November 30, 2001) reversing the Circuit Court's grant of Summary Judgment to these Appellees, on the following grounds:

1. The doctrine of comity, relied upon by this Honorable Court in its Opinion, is not applicable to a "deliberate intent" action brought under the West Virginia Workers' Compensation Act; and

2. The application of the substantive law of West Virginia to this matter violates the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause of the 14th Amendment of the United States Constitution.

II. ARGUMENT

A. The Doctrine of Comity Is Not Applicable to a "Deliberate Intention" Action Under the West Virginia Workers' Compensation Act.

The doctrine of comity and its application to the case at bar was not briefed or argued by the parties hereto, but it was the basis of the opinion of this Honorable Court reversing the Circuit Court's grant of Summary Judgment in favor of Bush & Burchett, Inc. and Joe Burchett. It is respectfully submitted that the authorities cited by this Honorable Court for the proposition that comity allows West Virginia to apply its own Workers' Compensation Act to this fact situation do not support this Honorable Court's opinion.

The case of *Bell v. Vecellio & Grogan, Inc.*, 475 S.E.2d 138 (W. Va. 1996), cited and relied upon by the this Honorable Court, was not decided based on the doctrine of comity. The *Bell* Court applied the West Virginia Workers' Compensation Act to plaintiff's claim because he was a person regularly employed in West Virginia whose duties necessitated employment of a temporary or transitory nature by the same employer outside West Virginia as contemplated by W. Va. Code § 23-1-1a. *Bell* never even mentioned comity.

Pasquale v. Ohio Power Co., 418 S.E.2d 738 (W. Va. 1992) does discuss the doctrine of comity as applied to an Ohio worker injured in West Virginia while temporarily working in West Virginia. The *Pasquale* Court noted that both Ohio and West Virginia apply their own workers' compensation statutes to injuries involving their residents injured while working out of state, and both preclude third-party contribution claims against employers who are otherwise protected under its workers' compensation statutes. The *Pasquale* Court then applied Ohio law to the case of an Ohio worker injured while working temporarily in West Virginia. *Pasquale* stands for the proposition that appellant Fred Russell, a Kentucky resident working for a Kentucky employer who was injured in Kentucky and received benefits from the employer's Kentucky workers' compensation carrier, should be subject to the Kentucky Workers' Compensation statute. However, there is a more recent case discussing the doctrine of comity as it may apply to a deliberate intention action, which was not cited by this Honorable Court and which these Appellees argue is dispositive on the issue.

With all due respect, this Honorable Court erroneously applied the doctrine of comity to the case at bar. In *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172, 175-176 (W. Va. 1996), a case which was decided two days after *Bell*, this Honorable Court stated that comity was not applicable to a deliberate intention action. Rather, the traditional choice of law principle of *lex loci delicti* was applicable. The Circuit Court based its decision granting the Motion for Summary Judgment on behalf of Bush & Burchett, Inc. and Joe Burchett on the principles of *lex loci delicti*, and this doctrine was fully briefed by these Appellees in this appeal.

In *Gallapoo*, when discussing the application of the doctrine of comity to a deliberate intention action, this Honorable Court stated:

> However, there is still a lingering question as to whether our deliberate intention cause of action is a common law tort remedy; whereby, we would not be obligated to apply the principles of comity announced in *Pasquale* to the extent that the exclusive remedy language contained in W. Va. Code 23-2-1c(c) precludes a non-resident employee's right to bring a deliberate intention claim against an employer under W. Va. Code 23-4-2(c)(2)(ii); but rather, we would apply our traditional choice of law principal of *lex loci delicti* (the law of the place of the wrong), thereby allowing the plaintiff to precede in his lawsuit because he was injured in West Virginia. Id. at 175.

The *Gallapoo* Court quickly answered this lingering question, finding that the deliberate intention statute is not a common law tort remedy, but is blended within the

West Virginia Workers' Compensation statutory scheme. Id. Therefore, the doctrine of comity was inapplicable in addressing a choice of law question relative to a deliberate intention action. *Id.* The *Gallapoo* Court then turned to an analysis of West Virginia Code § 23-2-1a and 23-2-1c(c) in order to determine the status of the plaintiff in that case. Both of those statutes were cited and discussed in the Brief filed by these Appellees in this appeal.

The clear distinction between this case and the situations contemplated by W. Va. Code § 23-2-1a and 23-2-1c(c) is that there is not a dual state interest presented here. Although Bush & Burchett had a contract with the West Virginia Department of Transportation, Division of Highways, the relationship between Bush & Burchett and Fred Russell was born and nurtured in Kentucky. Both employer and employee where [sic] Kentucky citizens. It is undisputed that the accident occurred in Kentucky and appellant received Kentucky Workers' Compensation benefits. Appellant, Fred Russell had his medical expenses paid by Kentucky Workers' Compensation, received temporary total disability benefits of over Twenty-One Thousand Dollars ($21,000.00) and received a lump sum settlement of One Hundred Thousand Dollars ($100,000.00) from his employer's Kentucky Workers' Compensation carrier. A copy of the Agreement as to Compensation and Order Approving Settlement, which was entered into after this appeal was perfected, is attached hereto as Exhibit A.

Based on this Honorable Court's analysis in *Gallapoo*, the doctrine of comity is not applicable to a deliberate intention action brought under the West Virginia Workers' Compensation Act, and it was clearly erroneous

for this Honorable Court to base its opinion that West Virginia law should apply to Appellants' claims against these Appellees on the doctrine of comity. Rather, Kentucky law should apply for the reasons set forth herein, and in the Brief of Appellees, Bush & Burchett, Inc. and Joe Burchett.

B. The Application of West Virginia Law to the Appellants' Claims Against Bush & Burchett, Inc. and Joe Burchett Violates the Full Faith and Credit Clause and Due Process Clause of the United States Constitution.

The application of West Virginia Law to the Appellants' claims against Bush & Burchett, Inc. and Joe Burchett violates the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause of the 14th Amendment of the United States Constitution. The Full Faith and Credit Clause requires each state to give effect to official acts of other states. A judgment entered in one state must be respected in another provided that the first state had jurisdiction over the parties and the subject matter. *Nevada v. Hall*, 440 U.S. 410, 421; 99 S. Ct. 1182, 1188; 59 L. Ed. 2d 416 (1979), rehearing denied April 16, 1979. A state statute is a "public act" within the meaning of the Full Faith and Credit Clause. *Carroll v. Lanza*, 349 U.S. 408, 411; 75 S. Ct. 804, 806; 99 L. Ed. 1183 (1955); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 154-155, 52 S. Ct. 571, 573-574, 76 L. Ed. 1026; *Alaska Packers Ass'n. v. Industrial Accident Comm.*, 294 U.S. 532, 55 S. Ct. 518, 79 L.Ed. 1044.

The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355, 68 S.Ct. 1087, 1092-93, 92 L. Ed. 1429. To vest the power of determining the extra-territorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of the other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Article IV of the Constitution to prevent. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 100 S. Ct. 2647, 2656, 65 L. Ed. 2d 757 (1980); *Nevada v. Hall*, 440 U.S. 410, 424-425, 99 S. Ct. 1182, 1190-1191, 59 L. Ed. 2d 416.

The *Thomas* Court cited *Reese and Johnson*, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 161-162 (1949), for the following statement:

> Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise "independent, sovereign states." Hence, it is for federal law, not state law, to prescribe the measure of credit which one state will give to another's judgment. In this regard, it is interesting to note that in dealing with full faith and credit to statutes the Supreme Court in recent years has accorded no weight to language which purported to give a particular statute extraterritorial effect. *Thomas*, 448 U.S. 261, 272, 100 S. Ct. 2647, 2656, 65 L. Ed. 2d 757 (footnote 15).

For a state's substantive law to be applied in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such the choice of its law is neither arbitrary nor fundamentally unfair. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312, 101 S. Ct. 633, 640, 66 L. Ed. 521 (1981), rehearing denied March 2, 1981.

In *Pacific Insurance Co. v. Industrial Accident Comm.*, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940, the United States Supreme Court addressed the issue of whether the Full Faith and Credit Clause precluded California from applying its own Workers' Compensation Act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment. The Court held that California was not precluded from applying its own law imposing greater responsibilities on the employer, and in doing so reasoned:

> Although Massachusetts has an interest in safe guarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. **Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.** 306 U.S. at 502-503, 59 S. Ct. at 633 (emphasis added).

Moreover, Full Faith and Credit Clause does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it. *Id.*, 306 U.S. at 504-505, 59 S. Ct. at 634.

The state where the employee lives and where he was injured has a large and considerable interest in the event. *Crider v. Zurich Insurance Co.*, 380 U.S. 39, 41 85 S.Ct. 769, 770 13 L. Ed. 2d 641 (1965). The state where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependence are among these. The state where the employee lives has perhaps a larger concern, for it is there that he is expected to return and it is on his community that the impact of the injury is apt to be most keenly felt. Certainly when the injury occurs in the home state of the employee, the interests of that state is at least commensurate with the interest of the state in which an injury occurs involving a non-resident. *Crider*, 380 U.S. at 41-42, 85 S. Ct. at 770, 13 L. Ed.2d 641; *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S. Ct. 804, 807, 99 L. Ed. 1183 (1955).

In *Carroll*, the plaintiff was an injured employee of a sub-contractor who sued the general contractor for damages. The sub-contractor and the employee were residents of Missouri who were working for the general contractor in Arkansas. The *Carroll* court held Arkansas could apply its law based on the fact that the injury occurred there, rather than in Missouri. In explaining its rationale, the Court stated:

> Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she pleases within her borders. Once that policy is extended

> into other states, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or,. . . . she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders. We do not think the full faith and credit clause demands that subserviency from the State of the injury. *Carroll v. Lanza*, 349 U.S. at 413-414, 75 S. Ct. at 807-808, 99 L. Ed. 1183.

In the current situation, this Honorable Court is attempting to extend West Virginia's exclusive remedy into Kentucky. Clearly, Kentucky has a greater interest than West Virginia where the accident involved a Kentucky resident working for a Kentucky employer, the employment relationship was consummated in Kentucky, that employee was covered by Kentucky Workers' Compensation law, received Kentucky Workers' Compensation benefits, and on top of that, the accident occurred in Kentucky and not in West Virginia. West Virginia's connection with and interest in this case is tenuous at best. West Virginia's insistence on the application of its own substantive law to this case ignores the undisputed facts of this case and Kentucky's superior interest herein, unjustifiably rendering Kentucky subservient. The Full Faith and Credit Clause and Due Process Clause mandate the application of Kentucky law to Appellants' claims against Bush & Burchett, Inc. and Joe Burchett.

III. CONCLUSION

Although the issue of comity was not raised or briefed by the parties to this appeal, this Honorable Court based its opinion reversing the Circuit Court's grant of Summary Judgment to Bush & Burchett, Inc. and Joe Burchett on the doctrine of comity. Yet, pursuant to *Gallapoo*, the doctrine of comity is not applicable to a deliberate intention cause of action arising under the West Virginia Workers' Compensation Act. This Honorable Court should apply the doctrine of *lex loci delicti* and affirm the decision of the Circuit Court of Kanawha County, West Virginia applying Kentucky law and dismissing Appellants' claims against these Appellees. Moreover, the application of West Virginia Code § 23-2-1c(c) also mandates the application of Kentucky law and the dismissal of Appellants' claims against these Appellees.

The application of West Virginia law to Appellants' claims against these Appellees, Bush & Burchett, Inc. and Joe Burchett, also violates the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause of the 14th Amendment of the United States Constitution. West Virginia's connection to this matter is derived solely through a contract with Bush & Burchett, Inc., and is tenuous at best. Kentucky clearly has more significant interests where Appellant was a Kentucky resident who worked for a Kentucky employer, the employment relationship was consummated in Kentucky, Appellant received Kentucky Workers' Compensation benefits, and the accident giving rise to this litigation occurred in Kentucky. These facts are clear and undisputed. Therefore, the Full Faith and Credit Clause and

Due Process Clause mandate the application of Kentucky law to this matter.

WHEREFORE, for all of the foregoing reasons, and for the reasons advanced in the Brief of Appellees, Bush & Burchett, Inc. and Joe Burchett, individually, Appellees, by counsel, hereby respectfully request that this Honorable Court grant their Motion for Rehearing and reconsider and vacate its November 28, 2001 Opinion as it relates to these Appellees, that this Honorable Court affirm the decision of the Kanawha County Circuit Court granting the Motion for Summary Judgment of Bush & Burchett, Inc. and Joe Burchett and dismissing Appellants' claims against them, with prejudice, and for such other relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,
BUSH & BURCHETT, INC., and
JOE BURCHETT,

BY COUNSEL

Scott W. Andrews, Esquire (WV#5772)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868

EXHIBIT A

COMMONWEALTH OF KENTUCKY

COUNTY OF FRANKLIN

I, Ched Jennings, Commissioner of the Department of Workers Claims of the Commonwealth of Kentucky do hereby certify that the attached is a true and correct copy of the Agreement as to Compensation and Order approving Settlement in the case styled Fred Russell Jr. vs. Bush & Burchett, Inc., WCB#96-72653.

I further certify that I am Custodian of the records of the Department of Workers Claims of Kentucky.

Given under my hand and the seal of the Department of Workers Claims of the Commonwealth of Kentucky on December 14, 2001, 10:30 a.m.

/s/ Ched Jennings
Ched Jennings, Commissioner
Department of Workers Claims

FORM 110-1
INJURY
Revised April 15, 1998

[ILLEGIBLE] _____
DOC. TYPE: AGRE
CLAIM NO.: _____

KENTUCKY DEPARTMENT OF WORKERS CLAIM
Frankfort, KY 40601

AGREEMENT AS TO COMPENSATION AND ORDER APPROVING SETTLEMENT
Workers' Compensation Claim No. 96-72653

IF THIS FORM IS NOT PROPERLY COMPLETED, IT WILL BE RETURNED.

Every section should be filled in. If a section is not applicable, fill in the blank with N/A.

Fred Russell, Jr.
Claimant

406-02-9552 5/25/57
Social Security Number/Date of Birth

4388 Coon Creek Road
Address

Salyersville, Kentucky 41465
City, State, Zip

Bush & Burchett, Inc.
Employer

P.O. Box 400
Address

Allen, Kentucky 41601
City, State, Zip

KY AGC/SIF
Insurer/Self-Insured/Self-Insurance Group

P.O. Box 436949
Insurer's Address

Louisville, Kentucky 40253-6949
City, State, Zip

Special Fund
Other particpating parties

1047 U.S. Hwy. 127 S. Suite 4
Address

Frankfort, Kentucky 40601
City, State, Zip

INJURY

Date: **November 1, 1996** County in which injury occurred: **Pike County**

Brief description of occurrence resulting in injury: **Fell off scaffolding.**

Nature of injury(ies) including body party(s) [sic] affected: **lumbar fractures**

MEDICAL INFORMATION

Medical expenses paid: **$51,269.29**
Medical expenses unpaid or contested: **n/a**
Surgery performed: **Yes**
Hospitalizations: **Yes**
Date of last medical payment: **current**
Nature of surgery: **ORIF of right radius laminectomy**
Length of hospital stay(s):

Impairment ratings: (Attach entire medical report that provides ratings):

	Date Given	Physician
36%	**4/26/00**	**Dr. Templin**
17%	**1/11/00**	**Dr. Rapier**

Restrictions on activities – Attach most recent medical report setting forth physical restrictions. Diagnosis or diagnoses: **In evidence.**

If medical treatment is continuing, attach a copy of executed Form 113 indicating designated physician.

WORK INFORMATION

Type c, work at time of injury: **Carpenter**

Average weekly wage at time of injury: **$994.10** Date of return to work after injury: **n/a**

Wages upon return to work: **n/a** Type of work performed after injury: **n/a**

Type of work performed at time of settlement: **n/a**

BENEFIT AND SETTLEMENT INFORMATION

Amount and duration of temporary total disability paid to date

$415.94	**X**	**52 6/7**	=	**$21,985.40**
Per week		No. of weeks		Total

Monetary terms of settlement: **$100,000.00,** to be paid as follows: **lump sum**

Total settlement amount **$100,000.00** Percent of permanent disability: **82%**

Settlement computation: **$90,000.00 to be paid by the Employer and $10,000.00 to be paid by the Special Fund. Plaintiff to receive $130.71 per week for an agreed to disability period of 1846 weeks, commuted to 765.0410 weeks and paid in a lump sum of $100,000.00.**

Does settlement amount include waiver or buy out of medical expenses? **No**

If yes, settlement amount for waiver or buy out: **n/a**

If settlement terms provide for lump sum representing weekly benefits greater than $10, does claimant have an adequate source of income during disability? **Yes**

Source of income: **Social Security**

Amount: **$1100.00 per month**

OTHER INFORMATION

If additional information is pertinent to settlement, explain, (Attach additional pages if necessary): **All sums are inclusive of attorney's fees and vocational rehabilitation expenses. This is a disputed claim as to the**

Plaintiff's degree of occupational disability. The Plaintiff alleges total disability and the settlement represents a compromise of this claim. In consideration of a payment of the claim in a lump sum, the Plaintiff agrees to waive his right to reopen, except for his right to medical expenses which shall remain the liability of the Employer pursuant to statute.

Other responsible parties against whom further proceedings are reserved: **n/a**

This the _____ day of July, 2000.

/s/ Wm. Grover Arnett
Attorney or representative for claimant (Signature)

Wm. Grover Arnett
Attorney or representative for claimant (name typed)

P.O. Box 489
Address

Salyersville, Kentucky 41465
City, State, Zip

/s/ Fred Russell Jr.
Claimant (Signature)

/s/ Timothy P. O'Mara
Attorney or representative for employer

Timothy P. O'Mara
2500 Brown & Williamson Tower
Address

Louisvile, Kentucky 40202
City, State, Zip

/s/ Barbara B. Sutton
Attorney for Special Fund

ORDER APPROVING SETTLEMENT AGREEMENT

IT IS ORDERED that the above Agreement as to Compensation be and the same is hereby **APPROVED.**

This the 24 day of July, 2000.

/s/ Thomas Young
Arbitrator/Administrative
Law Judge

National Review/August 20, 2001

Welcome to 'Tort Hell'

West Virginia, that is, A 'doctors crisis'

JAY NORDLINGER

The state of West Virginia, no stranger to problems, has a severe one on its hands now: a "doctors crisis." That's what many are calling it, and with good reason. West Virginia is losing doctors every day; communities are going without care; no doctors are coming in – it is almost impossible to recruit. The problem is the legal atmosphere: The state has earned the designation "Tort Hell," or, if you are a plaintiff's attorney, "Tort Heaven." In probably no other state is it as hard to be a doctor, or to remain one. Doctors are becoming desperate; the public, slowly – and in some areas, not so slowly – is waking up. The need for reform is crying. Of course, this need is felt all across the country; but nowhere is it felt more acutely than in West Virginia.

What makes things so tough? First, medical-malpractice insurance – or, as doctors prefer to call it, "liability insurance" – is through the roof. Many doctors simply can't afford it or, even if they could, can't get it. Then, the state slaps a "provider tax" on all doctors, in the amount of 2 percent of gross income; this is a tax merely for being a doctor, imposed on no other citizen; only one other state in the nation does this (Minnesota). Then, West Virginia – or, more accurately West Virginians – are wildly litigious. They have long been happy to stick it to doctors. Lawyers, naturally, thrive in such an environment. Some of them even advertise as follows: "If you have had such-and-such a procedure, come see me: There

could be some money in it." These ads don't suggest that something went wrong during that procedure, that the doctor was negligent in any way; the mere fact that the procedure has taken place is enough to put dollar signs in eyes.

Not often do doctors become political activists – the placard-bearing slogan-shouting, fist-shaking kind – but, as their insurance rates shot up and their practices were endangered, West Virginia doctors, as a class, got moving. Back in February, they staged what they called "White Coat Day." This was a Day of Rage/Day of Lobbying in which they swarmed the state capital, Charleston, and let the government know of their situation. Hundreds of doctors harangued legislators and warned the public: You may not like us – you may think we're a bunch of fat cats – but if things keep up, you'll have no one to take care of you. In one tense session, a doctor cried out, "Tax the trial lawyers!" Soon after, a radio message was aired: "Got a cold? See a lawyer."

Everyone has a horror story to tell; the dismay – sometimes panic – in doctors' voices is real, unfeigned. People are having to leave, retire early, or cease performing "high-risk" procedures, or even medium-risk ones: A doctor may stop delivering babies, or pulling tonsils. The Ohio Valley – which includes Wheeling – is now without neurosurgeons; they've all gone away, fed up. Says Evan Jenkins, executive director of the state medical association, "If your child falls off the bleachers [in the Valley] you better hope the ambulance has a lot of gas in it, because you'll have to go to Pittsburgh or Morgantown." This is dramatic language, but the doctors feel it's necessary to sound the alarm. In the Beckley area – rural and

poor – pregnant women are in a bind: The obstetricians have had to quit, because their liability insurance has become unaffordable, or unavailable. And Huntington – the second largest city in the state – is fast being depleted of its top doctors, particularly its specialists.

One of those is Jane Kurucz a general surgeon who specializes in breast diseases. Here is a typical case, but with an unusual twist: On Sunday afternoon, July 29, a rally was staged in support of her, in a downtown park. The event was organized by a patient, unhappy at losing her doctor, and, more than unhappy, angry. Dr. Kurucz has been practicing for 13 years. In that time, she has had one lawsuit against her (amazingly low for West Virginia), now pending. On May 1, she received a letter informing her that her insurance would not be renewed. In 1999, that insurance cost $40,000; the next year, it went up to $60,000; now it would cost $80,000, if she could get it – and that would be for only six months, because the insurance company figures it will have to raise the rate after that. The doctor has been unable to buy insurance from any other company; insurers, quite naturally, avoid West Virginia with shudders. Jane Kurucz had to close up shop on August 1.

She has options, however, the best of which is to move 20 miles to the west into Kentucky. There, she could double her salary; would pay about a third of the West Virginia rate for insurance; and would be free of that 2 percent provider tax. To top it off, many of her patients would be able to follow her.

So, this particular doctor will land pretty happily – but she is far from ecstatic. Her story goes to the heart of

the West Virginia doctors crisis. Dr. Kurucz is a native of the state, as is her husband, also a doctor (they practice together). The two of them wanted to make their lives at home. They could have stayed in New Orleans, where they trained, and where the husband was on the faculty at Tulane; they would have earned significantly more money. But they wanted their children to be near their grandparents, and they felt a loyalty to their state, as many West Virginians, even those forced to go elsewhere (maybe especially them), do. Dr. Kurucz is not interested in riches. "I was comfortable making what I was making [in Huntington]," she says. "I would never have looked elsewhere if I hadn't gotten that letter from my insurance company."

Huntington is now essentially without breast surgery. It may soon be without neurosurgery. The local neurosurgeons pay over $160,000 a year in insurance, if they manage to qualify for it. And as they leave, a chain reaction occurs: The city's residency program collapses; the medical school is in jeopardy. "The cascade effect is tremendous," as Dr. Kurucz says. Another general surgeon she knows is also having to leave; he has been practicing for 23 years. He, too, has had but a single suit against him, and he won it – but the insurance company said that it could no longer afford to cover him. So: gone.

"It's not really about us," says Dr. Kurucz (meaning, the doctors). "I'm flattered that people care about me, but it's more about *them*, and their access to medical care. Something has to happen. It's too late for me, but *something* has to happen." A fellow doctor – with long experience – says, after considering his words carefully: "You

know, if trends continue, the state could really face something like a Third World situation" – long trips to doctors' offices, a shaky quality of care, treatment by a specialist a rarity.

WOE UPON WOE

Already, West Virginia is, as the phrase goes, "medically underserved." A full 51 of the 55 counties are judged, by the federal government, underserved. And recruitment? Nearly futile. This is a state that should be doing everything conceivable to attract doctors, when it instead does most things conceivable to repel them. Steven Summer, head of the state hospital association, says that "national recruiting firms won't even take on a hospital as a client, won't even try to place a physician in this state. They say, 'Don't bother coming to me, because I can't get people to go there.' "

Neither can the state keep what it grows at home. Ninety percent of the graduates of the West Virginia University Medical School do their residencies somewhere else. *Ninety percent.* They are likely to stay, permanently, somewhere else, too. No matter what their desire might be, sensible people don't care to pay insurance rates two-thirds higher than what they can buy someplace else, including just across the border. West Virginia is bordered by five states; some 60 percent of the population lives on those borders; they, with varying degrees of inconvenience, can skip across for medical attention; those who live in the center of the state are hit the hardest, and they tend to be the poorest and unhealthiest, anyway. Foreign doctors have had to pick up the slack; a

great many come from the Philippines and India. Yet these doctors, some worry, are not determined to stay for long, and are not fully integrated into the communities. They fare especially poorly in jury trials.

The state's needs are fearsome. To begin with, West Virginia has the oldest median age of any state (besting even the retirement haven of Florida). The doctors, too, tend to be older, and they are, of course, not being replaced. Then there is the dreary roll call, with which West Virginians are painfully familiar. They are Number One, or close to it, in all the wrong places: #1 in the death rate (overall), #2 in the cancer death rate (for all cancers), #1 in the lung-cancer death rate, #1 in the pulmonary-disease death rate, #1 in the heart-disease death rate, #1 in the use of tobacco, etc. The scene is a medical nightmare; coupled with "Tort Hell," the nightmare worsens.

Then there is a matter that doctors and others trip around very, very lightly: One close observer calls it, with a bit of a twinge, the "Appalachian mentality." As he explains, "This is a culture that does not look kindly on success," a culture not likely to be sympathetic to doctors or other relatively high-earners, a culture of resentment, blame, and entitlement. The complaints of doctors – until quite recently – have fallen on deaf ears. As this observer puts it, "It's hard to win a case if you drive a Mercedes to it." Trial lawyers have a field day in front of juries. In one memorable case, a lawyer went to a blackboard and asked the defendant doctor (an ear-nose-and-throat man), "How much do you charge for this particular operation [a common sinus procedure]?" "Two thousand dollars," replied the doctor. "And how many of them do you do a year?" continued the lawyer. "About two hundred," came

the answer. Then the lawyer did the math on the blackboard. Everyone on the jury gasped – case closed.

■

West Virginia is a state that should be doing everything conceivable to attract doctors, when it instead does most things conceivable to repel them.

■

In addition, regular folks have a hard time believing that the enormous jury awards routinely handed out to plaintiffs will actually hurt doctors, to say nothing of their own communities. One doctor remembers that a patient of his had sat on a jury in a malpractice case, a case lost by the doctor being sued: "She said to me, 'I felt really bad for him [the accused doctor], but the lawyer was very dynamic and influential and emotional.' And then she said, "The doctor doesn't have to pay that money, does he?" That's the problem. People have no sense of what's involved. That doctor, first, has his name blackened and his life torn apart, and then he'll possibly lose his insurance and lose his practice. People never see that side of it."

THE LAWYERS DIG IN

The trial lawyers, of course, are fighting reform with all the (considerable) strength they can muster. They have some powerful allies: The state legislators tend to be lawyers, and sympathetic to those of their own trade; only lately have the cries of doctors, and those of their awakening patients (and the legislators' constituents), seemed to penetrate. Also, the state's largest and most

influential newspapers have been squarely on the lawyers' side. Soon after White Coat Day, for example, the *Charleston Gazette* ran a series aimed at debunking the doctors' claims and shoring up the lawyers' brief. While the series was challengeable (at best) substantively, it was effective psychologically and politically.

Still, the lawyers sense that they are vulnerable. They have turned to trying to make a villain out of the insurers, realizing that it's getting harder to portray all the state's doctors as greedy and inept. The new Democratic governor, Bob Wise, who campaigned last fall with the lusty backing of the trial bar, has signaled an openness to reform, aware of the facts on the ground. Earlier this year, the president of the state's trial lawyer association, in a letter to his members, wrote, "The upcoming legislative session cold be difficult. . . . Quite frankly, this combination of arguments [those of the doctors] is difficult to rebuff." Consequently, "we would like to develop some victims who can be spokespersons for the need to continue our current system." Lawyers and others can always "develop some victims" (most useful phrase); virtually all doctors acknowledge that there are some bad apples in their barrel, who deserve what the courts have to give them. But doctors, and the patients who need them, are increasingly victims too, and yelling about it.

What do they want (in the classic protesters' phrase)? They want controls on the "affordability and availability" of malpractice insurance. They want a brake on the frequency and exorbitance of lawsuits. They want, really, common sense – not protection, they insist, from their genuine mistakes, but protection from a system and a mindset that unfairly cripples them.

In the meantime, the "crisis" deepens. A relatively young doctor – newly and unexpectedly radicalized – sums it up well: "What these lawsuits do is devastating. Without tort reform, we're not going to make it. I know a guy who just had a case – completely unwarranted – that he won. It took three years. The trial was five days. Yeah, he won. But then, how did he 'win'? He may lose his insurability because of the dollars spent fighting the case. And it's not as though he will learn anything; it's not as though he needed some lesson. Maybe a guy who cuts off the wrong leg, sure. Or a guy who makes some medication error. But most of the time, the only lesson is: Don't take care of sick people, don't put yourself out, don't take care of someone with a brother who's a lawyer, or whatever."

He continues, "When we get hit with a suit, we ask ourselves, 'What could I have done?' And the answer is usually, Nothing. I was just in the wrong place.' And the wrong place, unfortunately, is West Virginia."

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NO. 01-1746

IN THE
Supreme Court of the United States

BUSH & BURCHETT, INC. AND JOE BURCHETT,

Petitioners,

v.

FRED RUSSELL, JR. AND REBECCA RUSSELL,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION

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July 18, 2002

QUESTION PRESENTED

This case concerns whether respondents Fred and Rebecca Russell may sue petitioners — a construction company and its principal — under the West Virginia workers' compensation statute for severe injuries suffered by Mr. Russell while working on a construction project commissioned by the State of West Virginia to build a bridge over the Tug Fork river running between West Virginia and Kentucky. The West Virginia Supreme Court of Appeals answered that question "yes," purely as a matter of state law, and reversed the trial court's dismissal on the ground that Kentucky law applied to the Russells' claims. The question presented is:

Should this Court grant review where:

(1) the ruling below did not finally decide the case, but rather remanded it for further proceedings, which may or may not result in a trial on the merits and liability for petitioners;

(2) the federal questions presented in the petition were neither properly raised nor decided by the courts below; and

(3) petitioners agreed in their construction contract with the State of West Virginia that all workers employed on the project would be protected by the West Virginia Workers' Compensation Act.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

I. This Court Lacks Jurisdiction 1

II. The Federal Issues Presented In The Petition Have Been Waived And The Petition Should Be Denied For That Reason As Well.. 3

III. The Full Faith And Credit And Due Process Arguments Presented In The Petition Are Premised On False Assertions Regarding The Facts Of This Case.. 5

IV. Even If This Court Had Jurisdiction, And Even If The Petition Presented A Properly Preserved Federal Question Based On An Accurate Rendition Of The Facts, There Would Be No Basis To Grant Review.. 6

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 4

Barney v. Auvil, 466 S.E.2d 801 (1995) 4

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Dothard v. Rawlinson, 433 U.S. 321 (1977) 4

Duignan v. United States, 274 U.S. 195 (1927) 4

Florida v. Thomas, 532 U.S. 774 (2001) 3

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) 1

Mkt. St. Ry. Co. v. R.R. Comm'n, 324 U.S. 548 (1945) 1

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 4

Taylor v. Cabell Huntington Hospital, Inc., 538 S.E.2d 719 (W. Va. 2000) 4

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 5

TRW, Inc. v. Andrews, 122 S. Ct. 441 (2001) 4

STATUTE AND RULE

28 U.S.C. § 1257 1

W. Va. Rules App. Proc. 24(a) 4

RESPONDENTS' BRIEF IN OPPOSITION

The petition is an amalgam of omissions and factual distortions. When those omissions are revealed, and the true facts are presented, it will be apparent that the petition should be denied.

I. This Court Lacks Jurisdiction.

Although the petition was filed within 90 days of the denial of rehearing below, this Court does not have jurisdiction under 28 U.S.C. § 1257, which provides jurisdiction over "[f]inal judgments or decrees" rendered by state courts of last resort.

The trial court dismissed the Russells' complaint on the grounds urged by petitioners — that the Russells had no cause of action under West Virginia law. The Supreme Court of Appeals vacated the dismissal and "remanded for further proceedings" that may or may not result in a final verdict on the merits. *See* Pet. App. 22. Thus, the decision below is "avowedly interlocutory," *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), and is not a final judgment for purposes of 28 U.S.C. § 1257. "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* at 81 (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945)). The final judgment rule minimizes this Court's interference with state-court litigation and promotes the orderly conduct of litigation. When "[r]esolution of the state-law claims could effectively moot the federal questions," *id.* at 82, which is true here, a writ of certiorari is unnecessary and therefore beyond the scope of jurisdiction authorized by § 1257.

There are narrow exceptions to the strict finality rule, none of which is applicable here. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that it may treat an interlocutory state-court decision as final in four limited circumstances. The first three are when the state court's decision on the "federal issue is conclusive or the outcome of further proceedings preordained"; when the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings"; and when later review of the federal issue will be foreclosed regardless of the outcome of the case. *Id.* at 479-81. None of these exceptions applies because the "decision" on the Full Faith and Credit and Due Process claims was not conclusive (indeed, there was no decision below on the federal questions) and the outcome of the case is certainly not preordained; if the Russells lose on the merits on remand, a decision on the federal issues would be avoided; and petitioners would be free to raise the federal issues on review from a judgment in the Russells' favor (assuming, quite generously, that petitioners have preserved those issues as a matter of state law).

The fourth *Cox* exception has two parts, both of which must be met for this Court to have jurisdiction. That exception applies where (1) the federal issue has been finally decided with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, *and* (2) reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action and a refusal immediately to review the state court decision might seriously erode federal policy. 420 U.S. at 482-83. Neither prong is met here. As explained below (at 3-4), the federal issues were *never* decided below, because petitioners

did not raise them until their petition for rehearing *after* the Supreme Court of Appeals ruled against them; and, although reversal on the grounds urged by petitioners would preclude further litigation against them on the Russells' West Virginia cause of action, it cannot plausibly be argued that allowing a single trial to go forward against petitioners "would seriously erode federal policy." At a minimum, the "erosion of federal policy" factor applies only where the state-court ruling will have some effect beyond the individual case, *see Florida v. Thomas*, 532 U.S. 774, 780 (2001), and that cannot be the case here because the ruling below did not even address the federal issues.

In sum, this Court does not have jurisdiction to review this case and the petition must be denied.

II. The Federal Issues Presented In The Petition Have Been Waived And The Petition Should Be Denied For That Reason As Well.

Petitioners assert that the Russells' claims are barred by the Full Faith and Credit and Due Process Clauses of the federal constitution. As shown in Part III below, that contention is incorrect and provides no basis for review. But there is a more fundamental reason why the petition should be denied: As noted above, petitioners did not raise the federal issues until their petition for rehearing after the court below had ruled against them on the purely state-law grounds that they had raised. *Compare* Brief of Appellees Bush & Burchett, Inc., in *Russell, et al. v. Bush & Burchett, Inc., et al.*, Appeal No. 28398 (Nov. 17, 2000) (raising purely state-law issues), *with* Petition for Rehearing of Appellees Bush & Burchett, Inc., at 7-11, in *Russell, et al. v. Bush & Burchett, Inc., et al.*, Appeals No. 28398 and 28720 (Dec. 28, 2001) (raising federal issues for the

first time). Not surprisingly, the Supreme Court of Appeals denied petitioners' request for rehearing without comment, and, as a result, this Court is not presented with a decision below that addresses the federal issues.

It is a long-established principle that this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Duignan v. United States*, 274 U.S. 195, 200 (1927). The Court should apply that principle and decline to review the issues presented here.[1]

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[1]Much like this Court, the Supreme Court of Appeals of West Virginia applies a "general rule" "that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Taylor v. Cabell Huntington Hospital, Inc.*, 538 S.E.2d 719, 725 n.13 (W. Va. 2000) (quoting *Barney v. Auvil*, 466 S.E.2d 801, 809 (1995)). That rule was violated in spades here, since the federal issues were not raised until the appellate *rehearing* stage. Under West Virginia law, rehearing is for the purpose of bringing to the attention of the court "points of fact or law" that "the Court has overlooked or misapprehended[,]" *see* W. Va. Rules App. Proc. 24(a), not for raising entirely new issues.

III. The Full Faith And Credit And Due Process Arguments Presented In The Petition Are Premised On False Assertions Regarding The Facts Of This Case.

The petition is based entirely on the following assertion: because *all* of Fred Russell's contacts were with Kentucky and *all* of the facts concerning the accident arose in Kentucky, allowing the Russells an award under the West Virginia workers' compensation statute would violate principles of Full Faith and Credit and Due Process, where Mr. Russell had previously obtained a Kentucky workers' compensation recovery. Even assuming its factual premises, petitioners' argument is, to put it charitably, suspect — after all, the principal argument advanced by petitioners is that a decision of this Court, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), should be *overruled. See* Pet. 7-12. In any event, petitioners' factual premises are false. In fact, the Russells' case has a significant nexus with West Virginia. Consider, among other things, the following:

- First, and of dispositive importance, the West Virginia state bidding process in which petitioner Bush & Burchett participated, and the construction contract between the West Virginia Department of Transportation's Division of Highways and petitioner Bush & Burchett, specifically required that all "project workers would be covered by the West Virginia Workers' Compensation Fund and Act." Pet. App. 115-16. Based on this undisputed fact, the Supreme Court of Appeals held (Pet. App. 12):

> that there is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers

> on a West Virginia state-funded construction project. B&B was unquestionably aware of and contractually agreed to comply with this policy. No countervailing factors weigh heavily against applying West Virginia law in this circumstance. Accordingly, the pertinent factors in a comity analysis weigh conclusively on behalf of the Russells being authorized to bring a deliberate intention action against B&B under West Virginia law.

- The bridge project required work in both Kentucky and West Virginia, and Mr. Russell worked "the majority of [his] work hours ... in the State of West Virginia." Russell Affidavit, ¶ 8.

- Prior to his injury, Mr. Russell worked for approximately 3 and ½ years for Bush & Burchett on another project in *West Virginia*.

These facts were uncontroverted in the trial court, but none of them appears in the petition. However, they dispose of the question presented on the merits, even assuming, quite generously, that the question presented is legally colorable. The petition should be denied for this reason as well.

IV. Even If This Court Had Jurisdiction, And Even If The Petition Presented A Properly Preserved Federal Question Based On An Accurate Rendition Of The Facts, There Would Be No Basis To Grant Review.

Even if the Court were to assume that it has jurisdiction (which it does not), and were to look past petitioners' waiver of

the questions presented (which it should not) and petitioners' distortion of the factual record (which undermines any claim of error by the court below), review would still be unwarranted. As to the Full Faith and Credit issue, as noted earlier, petitioners concede that controlling law is contrary to their position and seek certiorari to overrule one of this Court's precedents. Overriding the principle of *stare decisis* is rare in any circumstance; at the very least, petitioners must come forward with compelling evidence that the controlling authority — *Thomas* — has caused problems of judicial interpretation, administrative enforcement, or fairness to litigants or workers' compensation insurers. The petition cites *no* such problems; indeed, it does not cite a single case from any jurisdiction even suggesting that *Thomas* is a cause for concern, nor does it cite any secondary authority (such as a workers' compensation treatise or law review article) or empirical analysis indicating that the result that petitioners seek is needed.[2]

Petitioners' purported due process claim — that West Virginia has exceeded its "legislative jurisdiction" because of West Virginia's alleged lack of contacts with the "regulated subject" (*i.e.*, Bush & Burchett), *see* Pet. 17 — is even more strained than their Full Faith and Credit claim. For the reasons explained in Part III above, this argument is fatally flawed because West Virginia has very significant contacts with this case, which concerns a bridge project over a river that runs

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[2]The petition implies that the decision below would allow Mr. Russell a double recovery, but that is not so. If the Russells were to recover under West Virginia law, the Kentucky workers' compensation insurer would presumably assert its subrogation rights against Mr. Russell to the extent of its Kentucky workers' compensation payout. Certainly, nothing in the decision below, or in *Thomas*, would bar such subrogation.

between West Virginia and Kentucky. Even assuming away the real facts, and focusing only on the portions of the record that petitioners have shared with the Court, *see* Pet. 17-18, the case would not be worthy of review. Petitioners do not claim that there is a serious problem with inappropriate assertions of extraterritorial legislative jurisdiction around the country or even by the State of West Virginia, nor do they cite any cases that even hint at such a problem. Thus, this Court's review of the decision below would turn on the highly idiosyncratic facts pertaining to the West Virginia Division of Highway's bridge construction project on the Tug Fork river and would have no effect beyond the Russells' claim for recovery under West Virginia's workers' compensation law. Thus, even on its own terms, the petition provides no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
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BUSH & BURCHETT, INC. AND JOE BURCHETT,

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. This Court Has Jurisdiction Under 28 U.S.C. § 1257	1
II. The Federal Issues Presented in the Petition Have Not Been Waived	3
III. Petitioners' Arguments Are Not Premised On False Assertions Regarding The Facts of This Case	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Barrio v. San Manuel Division Hospital for Magma Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984) 6

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1, 2

Florida v. Thomas, 532 U.S. 774 (2001) 2

Flynt v. Ohio, 451 U.S. 619 (1981) 1

Nelson v. Adams, USA, Inc., 529 U.S. 460 (2000) 4, 5

Taylor v. Cabell Huntington Hospital, Inc., 538 S.E.2d 719 (W.Va. 2000) 5

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 8

Whitlow v. Board of Educ., 190 W.Va. 223, 438 S.E.2d 15 (1993) 6

INTRODUCTION

COME NOW the Petitioners, Bush & Burchett, Inc. and Joe Burchett, by their counsel, with their Reply to the Respondents' Brief in Opposition, and hereby states as follows in support of their Petition for Writ of Certiorari.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. § 1257.

Title 28 U.S.C. § 1257(a) authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." In certain circumstances, the Court has treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court. *Flynt v. Ohio*, 451 U.S.619, 620-621 (1981).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court divided cases of this kind into four categories. The first category includes those cases in which "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. This matter fits into the first *Cox* category because even though a trial has yet to occur in the state courts the determination of the federal issues advanced are conclusive. A determination that the Supreme Court of Appeals of West Virginia violated the Full Faith and Credit clause and the Due

Process clause as alleged by Petitioners would be determinative of this matter, which was a final judgment in the state court when it reached the Supreme Court of Appeals of West Virginia.

The second and third *Cox* categories are inapplicable. However, the fourth *Cox* category includes those case where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be conclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state court for purposes of the state litigation." *Id.* at 482-483. See also: *Florida v. Thomas*, 532 U.S. 774 (2001).

This case is a textbook example of the fourth *Cox* category. Although Petitioners may prevail on the merits on nonfederal grounds, reversal of the state court on the federal issues presented would preclude any further litigation on the relevant cause of action. Furthermore, federal policy would be eroded by continuing to permit the courts of one state, such as West Virginia, from ignoring the clear application of the laws of another foreign state, such as Kentucky, where clearly the laws of the foreign state are controlling. As such, the judgment of the Supreme Court of Appeals of West Virginia appealed from is

final and subject to review by this Court pursuant to 28 § 1257(a).

II. The Federal Issues Presented in the Petition Have Not Been Waived.

Respondents assert that the Petitioners, Joe Burchett and Bush & Burchett, Inc., have waived their Constitutional due process claims which were addressed to both the Supreme Court of Appeals of West Virginia and, more immediately, to this Court. The basis upon which Respondents argue waiver is their misplaced assertion that Petitioners' due process arguments were not presented below. This position is incorrect.

First, Respondents argue that Bush & Burchett did not raise the federal issues until their petition for rehearing after the Supreme Court of Appeals of West Virginia "ruled against them on the purely state-law grounds that they had raised." Respondents' Brief, p. 3. Petitioners Bush & Burchett successfully argued in the Circuit Court that Kentucky, and not West Virginia had jurisdiction. Respondents then appealed to the West Virginia Supreme Court of Appeals.

After the West Virginia court rendered its November 28, 2001 opinion, based upon the court's interpretation of comity, *which was not raised or argued by either party*, Petitioners sought rehearing on the decision, advancing their Full Faith and Credit and Due Process arguments.

Petitioners were never aggrieved until the Supreme Court of Appeals of West Virginia rendered its Opinion and Judgment on November 28, 2001. Petitioners properly addressed their arguments that the November 28, 2001

decision violated the Full Faith and Credit and Due Process Clauses of the United States Constitution in their Petition for Rehearing. The West Virginia Supreme Court of Appeals, however, denied this petition by Order stating, "The Court, *having maturely considered the petition for rehearing* filed by the appellees, Bush & Burchett, . . . doth hereby refuse said petition for rehearing." See Pet. Appendix at 29-30. (Emphasis added.)

Respondents contend that "[i]t is a long-established principle that this Court will not address arguments neither presented nor decided below." Resp. Brief in Opp. at 4. That principle does not apply here. Petitioners' arguments on the issues of Full Faith and Credit and Constitutional Due Process were certainly presented to the court below. And according to the order, the West Virginia court maturely considered the Petitioners' arguments.

All that is necessary is that the lower court "be fairly put on notice of the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). In *Nelson*, this Court addressed whether waiver prevented a petitioner from raising issues of due process which the respondent claimed had not been raised in the lower court. This Court wrote the following:

> It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; *rather it requires that*

> *the lower court be fairly put on notice as to the substance of the issue.* (citation omitted.)

Id.[1] (Emphasis added.)

The Supreme Court of Appeals of West Virginia was most fairly put on notice that its November 28, 2001 decision violated the Full Faith and Credit and Due Process Clauses of the United States Constitution. Surprisingly or not, the court denied the petition for rehearing; however, that denial is not a basis for this Court to refuse the Petition for a Writ of Certiorari. In the *Nelson* case, this Court specifically noted that the lower court in that case had also passed upon rendering any opinion on the petitioner's due process grounds. *Id.* at 470. This Court maintained, though, that the matters of due process were the ultimate grounds for resolution of the appeal. *Id.*

Finally, Respondents insert an editorial footnote addressing the Supreme Court of Appeals of West Virginia's "general rule" "that nonjurisdictional questions not raised at the circuit court level . . . will not be considered." Resp. Brief at 4 n. 1, *quoting Taylor v. Cabell Huntington Hospital, Inc.*, 538 S.E.2d 719, 725 n. 13 (W.Va. 2000). The basis for the petition is the West Virginia court's unconstitutional extension of adjudicative and legislative *jurisdiction*. Therefore, this "general rule" is not applicable.

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[1] As stated in a footnote to the *Nelson* decision, the issue of due process in this case was only raised before the lower court in a statement made during oral arguments. Even under these facts, this Court concluded that the petitioner had not waived its right to raise its due process issues on appeal. *Nelson*, 529 U.S. at 470, n. 4.

The Supreme Court of Appeals of West Virginia advanced the applicable precedent in *Whitlow v. Board of Educ.*, 190 W.Va. 223, 438 S.E.2d 15 (1993). In that case, the West Virginia court wrote the following:

> [W]e are confronted with very limited and essentially undisputed facts. The constitutional issue raised for the first time on appeal is the controlling issue in the resolution of the case. If the statute is unconstitutional, the case should not be dismissed. Furthermore, the issue is one of substantial public interest that may recur in the future. . . . "We believe that the constitutional issue in the case at bench is sufficiently important that it should be considered even though not raised in the trial court."

Whitlow, 438 S.E.2d at 19 (*quoting Barrio v. San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 104, 692 P.2d 280, 283 (1984)).

The Supreme Court of Appeals West Virginia thus recognizes the "substantial public interest" imperative in rendering judgements when the Constitution lies in the cross hairs.

Moreover, Respondents failed to respond or object to the Constitutional arguments in the state court below. By failing to assert their waiver argument in the state court proceedings below, Respondents have themselves waived their waiver argument.

III. Petitioners' Arguments Are Not Premised On False Assertions Regarding The Facts Of This Case.

Respondents are trying to create factual disputes regarding irrelevant facts, as the relevant facts to the issues presented herein are undisputed: Respondent, Fred Russell is a Kentucky resident who was employed by a Kentucky corporation, was injured in Kentucky and received Kentucky Workers' Compensation benefits. All of those facts are undisputed.

Petitioners do not dispute the existence of the construction contract between Petitioner, Bush & Burchett, Inc. and the West Virginia Department of Transportation, Division of Highways. Petitioners do dispute the West Virginia Supreme Court of Appeals' interpretation of that contract, which contradicted sworn testimony from both parties to the contract. Petitioners argued extensively in their briefs below that the contract did not require Bush & Burchett, Inc.'s employees to be protected by the West Virginia Workers' Compensation Fund. Appendix to Petition, pp. 91-94, 158-162. Rather, the contract merely provided that Bush & Burchett, Inc.'s employees be protected in accordance with West Virginia Workers' Compensation law. Bush & Burchett, Inc. complied with West Virginia law when they obtained Kentucky Workers' Compensation coverage for their Kentucky employees. In any event, given that it is undisputed that Respondent accepted Kentucky Workers' Compensation benefits, the contract language is irrelevant. The contract is relevant merely because its provides the only tangential nexus between this case and West Virginia.

Petitioners also disputed Mr. Russell's work history prior to the accident, as a significant portion of Mr. Russell's

prior work history was in Kentucky. It is simply incorrect for Respondents to assert, as they do at p. 6 of Respondents' Brief, that these facts were uncontroverted in the trial court. These facts were extensively argued in the pleadings filed in the state courts. Appendix to Petition, pp. 49-50, 99-100, 144-145, 167-168. However, these facts are not relevant for the determination of the Constitutional issues presented herein due to the undisputed facts which require the application of Kentucky law. Namely, Mr. Russell was a Kentucky resident employed by a Kentucky employer, was injured in Kentucky and accepted Kentucky Workers' Compensation benefits. Because he is seeking tort damages rather than a supplemental Workers' Compensation award, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), must be clarified.

CONCLUSION

For these reasons, and for the reasons set forth in the Petitioners' Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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